(10)

No. 92-1949-CMY
Status: GRANTED

Title: Robert L. Davis, Petitioner
v.
United States

Docketed:
June 8, 1993

Court: United States Court of Military Appeals

Counsel for petitioner: Jonas,David S.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Jun 8 1993	G	Petition for writ of certiorari filed.
3	Jul 1 1993		Order extending time to file response to petition until August 9, 1993.
4	Aug 9 1993		Brief of respondent United States in opposition filed.
5	Aug 11 1993		DISTRIBUTED. September 27, 1993
8	Oct 4 1993		REDISTRIBUTED. October 8, 1993
10	Oct 12 1993		REDISTRIBUTED. October 15, 1993
12	Oct 25 1993		REDISTRIBUTED. October 29, 1993 (Page 24)
13	Nov 1 1993		Petition GRANTED.
			**********
14	Dec 16 1993		Joint appendix filed.
15	Dec 16 1993		Brief of petitioner Robert Davis filed.
16	Dec 16 1993		Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
17	Dec 28 1993		Brief amici curiae of Americans for Effective Law Enforcement, et al. filed.
18	Jan 18 1994		Brief of respondent United States filed.
19	Jan 19 1994		Brief amici curiae of Washington Legal Foundation, et al. filed.
20	Feb 2 1994		SET FOR ARGUMENT TUESDAY, MARCH 29, 1994. (1ST CASE).
21	Feb 3 1994		Record filed.
		*	Original proceedings United States Court of Military Appeals and United States Navy. (1 BOX)
22	Feb 4 1994		CIRCULATED.
23	Feb 18 1994	X	Reply brief of petitioner Robert Davis filed.

1-P

92-1949

No. 92-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

ROBERT L. DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When a suspect makes an ambiguous request for counsel during a custodial interrogation, must the interrogator cease questioning until the suspect is provided with counsel?

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Supreme Court of the United States

OCTOBER TERM, 1992

NO. 92-

ROBERT L. DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITION FOR WRIT OF CERTIORARI

The petitioner, Robert L. Davis, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals rendered in this proceeding on March 11, 1993.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals, *United States v. Davis*, 36 M.J. 337 (C.M.A. 1993), is reprinted as Appendix A.

The unpublished opinion of the United States Navy-Marine Corps Court of Military Review, *United States v. Davis*, No. 89 2569 (N.M.C.M.R. September 16, 1991), is reprinted as Appendix B.

JURISDICTION

The United States Court of Military Appeals affirmed the decision of the United States Navy-Marine Corps Court of Military Review on March 11, 1993. 28 U.S.C. § 1259(3) provides jurisdiction in this case and entitles petitioner to seek review of the United States Court of Military Appeals' decision.

STATEMENT OF THE CASE

Petitioner was found guilty of one count of unpremeditated murder, in violation of 10 U.S.C. § 918. At trial, petitioner moved to suppress admission of his statements made during a custodial interrogation to agents of the Naval Investigative Service on November 4, 1988. Petitioner argued that he requested a lawyer during the interview. However, one of the agents testified that petitioner only said, "maybe [he] should talk to a lawyer." The agents did not attempt to obtain a lawyer for petitioner, but instead clarified petitioner's request before they continued to interrogate him. The trial judge denied petitioner's motion to suppress, finding that petitioner's statements during interrogation did not invoke his right to counsel. Thereafter, the military judge sentenced appellant to a dishonorable discharge, confinement for life, forfeiture of all pay and allowances, and reduction to pay grade E-1.

Upon subsequent review, in an unpublished opinion, the Navy-Marine Corps Court of Military Review affirmed the findings and sentence below. *United States v. Davis*, No. 89 2569 (N.M.C.M.R. September 16, 1991). The Navy-Marine Corps Court of Military Review did not specifically address the issue raised in this petition.[1] App. B.

[1] This issue was expressly raised before the Navy-Marine Corps Court of Military Review.

On appeal, pursuant to 10 U.S.C. § 867(a)(3), the Court of Military Appeals affirmed appellant's conviction. *United States v. Davis*, 36 M.J. 337 (C.M.A. 1993). The Court of Military Appeals affirmed on the ground that the agents properly clarified appellant's request before continuing the interrogation. App. A, p. 11a.

REASON FOR GRANTING THE WRIT

A SPLIT AMONG VARIOUS STATE AND FEDERAL COURTS EXISTS OVER WHAT STANDARD A COURT SHOULD USE FOR DETERMINING THE CONSEQUENCES OF AN AMBIGUOUS REQUEST FOR COUNSEL.

Three conflicting standards are used by state and federal courts for determining the consequences of an ambiguous request for counsel during a custodial interrogation. *Smith v. Illinois*, 469 U.S. 91, 95-96 and n.3 (1984). The Court should resolve this conflict in order to ensure consistency among the lower courts in their approach to this issue. As Justice White observed in a recent order denying a petition for writ of certiorari on this issue:

> [I]t is apparent that a substantial number of criminal defendants who are identically situated in the eyes of the Constitution have received and will continue to receive dissimilar treatment [after making an ambiguous request for counsel.] [B]ecause of the different approaches taken by the lower courts, I would grant certiorari.

Mueller v. Virginia, 113 S.Ct. 1880, 1881 (1993) (White J., dissenting).[2]

[2] Justice Blackmun and Justice Souter joined in the dissent.

An accused who invokes his right to counsel during a custodial interrogation may not be subjected to further interrogation until counsel is made available to him, unless the accused initiates further communication. *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981); *See Miranda v. Arizona*, 384 U.S. 436, 474 (1966).[3] However, this Court has left unresolved the issue of whether the *Edwards* bright-line rule applies when an accused makes an ambiguous invocation of his right to counsel. *Smith v. Illinois*, 469 U.S. at 96. The Court should issue a writ of certiorari in order to resolve this issue.

Some courts have adopted the position that all questioning must cease once a suspect mentions the word "attorney" or "counsel." *See, e.g., Maglio v. Jago*, 580 F.2d 202, 205 (6th Cir. 1978); *People v. Alexander*, 261 N.W.2d 63 (Mich. 1977), *cert. denied sub nom Michigan v. Borman*, 436 U.S. 958 (1978); *People v. Superior Court of Mono County*, 542 P.2d 1390, 1394-95 (Cal. 1975), *cert. denied*, 429 U.S. 816 (1976). These courts have based their reasoning upon a broad reading of *Miranda*'s requirement that all questioning stops once an accused "indicates in any manner" that he wants to speak with an attorney. *Maglio v. Jago*, 580 F.2d at 205.

In stark contrast to those decisions, some courts have taken a more conservative approach, holding that there exists a threshold of clarity which an accused must reach before he has invoked his right to counsel. *See, e.g., Virginia v. Mueller*, 422 S.E.2d 380, 387 (Va. 1992), *cert. denied*, 113 S. Ct. 1880 (1993); *People v. Krueger*, 412 N.E.2d 537, 540 (Ill. 1980), *cert. denied*, 451 U.S. 1019 (1981); *Dean v. Commonwealth*, 844 S.W.2d 417, 420 (Ky. 1992); *Russell v. State*, 727 S.W.2d 573, 575

[3] "The bright-line rule of *Edwards* also applies to military interrogations." *United States v. Applewhite*, 23 M.J. 196, 198 (C.M.A. 1987).

(Tex. Crim. App. 1987) (en banc), *cert. denied*, 484 U.S. 856 (1987). These courts have attempted to restrict the scope of *Edwards* to only situations where an accused has "clearly asserted" his right to counsel. *Virginia v. Mueller*, 422 S.E.2d at 387.

As a compromise position, other courts, including the court below, have adopted a third approach, where all questioning must cease except for narrow questions to clarify the earlier ambiguous request. *See, e.g., United States v. Porter*, 776 F.2d 370 (1st Cir. 1985); *United States v. Gotay*, 844 F.2d 971, 975 (2nd Cir. 1988); *United States v. Riggs*, 537 F.2d 1219, 1222 (4th Cir. 1976); *United States v. Cherry*, 733 F.2d 1124, 1130-31 (5th Cir. 1984); *United States v. Fouche*, 776 F.2d 1398, 1405 (9th Cir. 1985); *Towne v. Dugger*, 899 F.2d 1104 (11th Cir. 1990), *cert. denied*, 498 U.S. 991 (1990). These courts have attempted to strike a balance between the rights of the accused and prosecutorial interests. By applying this standard, the United States Court of Military Appeals has joined the division among the courts. App. A, p. 10a.

In applying the third approach, the court below failed to apply the correct standard for determining the consequences of an ambiguous request for counsel. App. A, p. 10a. The appellate court below should have followed the first approach which would have required the interrogators to cease all questioning once the petitioner mentioned the word "attorney."[4] This approach allows a qualified attorney to clarify an accused's request, and also protects an accused from being badgered by police officers to answer further questions when he wants to invoke his fundamental right to counsel.

[4] In addressing questions involving waiver of counsel rights, the Court has given a broad interpretation to a defendant's request for counsel. *Michigan v. Jackson*, 475 U.S. 625, 633 (1986).

CONCLUSION

Petitioner asks the Court to resolve the issue of what standard a court should use for determining the consequences of an ambiguous request for counsel during a custodial interrogation. In doing so, the Court will resolve the split among the lower courts on this important question of Constitutional law and ensure that all defendants are treated equally. Accordingly, the Court should issue a writ of certiorari.

Respectfully submitted,

DAVID S. JONAS
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June 1993

APPENDICES

APPENDIX A

U.S. COURT OF MILITARY APPEALS

No. 67,458
NMCM 89 2569

UNITED STATES, APPELLEE

v.

ROBERT L. DAVIS, OPERATIONS SPECIALIST SEAMAN APPRENTICE, U.S. NAVY, APPELLANT

Argued Nov. 3, 1992.
Decided March 11, 1993.

For Appellant: *Lieutenant Mary Anne Razim-Fitzsimmons*, JAGC, USNR (argued); *Lieutenant Franklin J. Foil*, JAGC, USNR.

For Appellee: *Captain Brett D. Barkey*, USMCR (argued); *Colonel T.G. Hess*, USMC and *Lieutenant Ralph G. Stiehm*, JAGC, USNR (on brief); *Commander W.F. Shields*, JAGC, USN.

Opinion of the Court

GIERKE, Judge:

A general court-martial composed of officer members convicted appellant of unpremeditated murder, in violation of Article 118, Uniform Code of Military Justice,

10 USC § 918. His approved sentence provides for a dishonorable discharge, confinement for life, total forfeitures, and reduction to E-1. The Court of Military Review affirmed the findings and sentence in an unpublished opinion dated September 16, 1991.

This Court granted review of the following issues:

I

WHETHER THE NAVY-MARINE CORPS COURT OF MILITARY REVIEW ERRED IN AFFIRMING THE TRIAL JUDGE'S DENIAL OF APPELLANT'S MOTION TO SUPPRESS BOTH HIS POOL CUES, AND ALL STATEMENTS MADE TO NAVAL INVESTIGATIVE SERVICE AGENTS ON 20 OCTOBER 1988, AS PRODUCTS OF AN UNWARNED INTERROGATION IN VIOLATION OF HIS ARTICLE 31(b) RIGHTS.

II

WHETHER THE TRIAL JUDGE ERRED BY FAILING TO SUPPRESS APPELLANT'S STATEMENTS TO NIS AGENTS DURING THE 4 NOVEMBER CUSTODIAL INTERROGATION.

Factual Background

Seaman Apprentice Keith Shackleton was found dead behind the commissary at Charleston Naval Base at approximately 5:30 a.m. on October 3, 1988. Shackleton was last seen alive playing pool at the Charleston Naval Base Enlisted Mens' Club on the evening of October 2. He died of head injuries inflicted with a blunt object. During the ensuing investigation Naval Investigative Service (NIS) agents interviewed "maybe a hundred to two hundred and fifty people." The interview notes of NIS Special Agent (SA) Baldwin indicate that appellant was one of several persons interviewed at the Enlisted

Mens' Club on the evening of October 14, 1988, but the contents of that interview were not established on the record.

On October 17, SA Sentell, the lead agent in the investigation, was informed by a pathologist that "the injuries look to be consistent with a long tubular shock-absorbing object." The pathologist told SA Sentell that "a pool cue, butt end of a pool cue stick could have been used."

On October 18, SA Sentell interviewed two sailors, who told her that appellant was at the club on the night of October 2 until near closing time. The NIS agents also learned, from sources not mentioned in testimony, that only personally owned pool cues were allowed to be removed from the Enlisted Mens' Club. The NIS then began trying to determine which patrons of the Enlisted Mens' Club owned their own pool cues.

On October 19, NIS agents Sentell and Clark went aboard appellant's ship to interview him, but he was absent without authority. On October 20, they determines that appellant was present for duty and returned to his ship to interview him. They informed appellant's command that appellant was "a possible witness."

Before they interviewed appellant on October 20, SA Clark and SA Sentell were informed by the ship's executive officer that appellant was being referred to medical authorities for a mental status evaluation. SA Clark testified that he was informed that appellant "had made a statement regarding wanting to shoot somebody." SA Clark concluded that appellant "was prone to making statements of that nature," but he did not regard the information as pertinent because "we were not looking at a victim of a shooting." SA Sentell testified that she was informed that appellant had said "he might need to kill a cop" and that the command was concerned about appellant's "mental stability."

Prior to interviewing appellant, SA Clark interviewed Petty Officer Guidry. Guidry had heard appellant say that he heard (from another person) that Shackleton had been "hit and jabbed with a pool stick." The cause of Shackleton's death was not common knowledge, and SA Clark regarded this information "as intimate information regarding the manner of death."

When he was interviewed by the NIS on October 20, appellant was restricted to his shop because of prior misconduct unrelated to the murder of Shackleton. Appellant was escorted to the interview room aboard ship by Petty Officer Smith, a master-at-arms. Smith told the NIS agents that appellant had told him (Smith) "that he didn't kill [Shackleton], but he knew who did and he wasn't going to tell unless it looks like he was going to get blamed for the death."

Appellant was not advised of his Article 31(b)* rights prior to being interviewed by SA Clark and SA Sentell, because they did not consider him a suspect. Appellant was shown a photograph of Shackleton and said that he recognized him because he had "shot pool with him." Appellant confirmed that he was at the club on the evening of October 2. Regarding Shackleton's death, appellant "said that he had heard that the guy was beaten with a pool stick from Bonnie and Wade—Bonnie Krusen and Wade Bielby." Appellant told the NIS agents

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* Article 31, Uniform Code of Military Justice, 10 USC § 831, provides in pertinent part as follows:

(b) No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

that he owned two pool cues. SA Sentell described appellant's attitude during the interview as "[v]ery cooperative." The entire interview lasted about 30 minutes.

Appellant led the NIS agents to his girlfriend's house, where he removed a case containing two pool cues from his girlfriend's automobile and gave them to SA Clark. This agent told appellant that he would like to examine the pool cues, at which time appellant pointed out a spot on the pool cue case. Appellant first said that the spot was catsup, but then he said it might be his own blood.

Appellant's service records were obtained by the NIS agents on October 25. Those records reflect that appellant was absent from his duty station on the morning of October 3, the day that Shackleton's body was found, but both SA Clark and SA Sentell testified that they did not review appellant's service records until after October 20 and that they were unaware of his unauthorized absence on October 3 when they interviewed him on October 20.

Appellant was neither the first nor the last witness interviewed, nor was he the first or last who was asked to produce his pool cue for examination. SA Clark testified that one other pool cue had been "collected" from "Kaiser" and examined prior to the interview with appellant. Bonnie Krusen and Wade Bielby, who had been interviewed prior to appellant, were interviewed again after appellant mentioned them, along with "a lot" of other witnesses. The NIS also obtained pool cues from Bonnie Krusen and Wade Bielby.

On November 1, SA Clark interviewed Petty Officer Mull, who informed SA Clark that appellant had admitted killing Shackleton. At that point the NIS agents regarded appellant as a suspect.

On November 4, 1988, appellant was escorted to the NIS office to be interviewed. SA Sentell advised him of his Article 31(b) rights and his right to counsel. Appellant executed a written waiver of his rights. SA Sentell orally asked appellant "if he would answer some questions" and appellant responded that he would "because he didn't kill anyone." The interview began at about 4:30 p.m.

SA Sentell testified that at approximately 5:53 p.m., appellant said, "Maybe I should talk to a lawyer." She then stopped questioning appellant about the offense. When asked if she did anything to clarify appellant's comment, she testified:

> [We] made it very clear that we're not here to violate his rights, that if he wants a lawyer, then we will stop any kind of questioning with him, that we weren't going to pursue the matter unless we have it clarified is he asking for a lawyer or is he just making a comment about a lawyer, and he said, "No, I don't want a lawyer," and then he said he didn't kill the guy and he said that he was the type of person that if he did kill the guy, he'd have to tell someone about it."
>
> Q. So, as you were clarifying whether or not he wanted a lawyer, the accused specifically said that he did not, correct?
>
> A. Correct.
>
> Q. And then he went on and he initiated further conversation beyond that?
>
> A. Yes, he did.

The NIS agents took a short break after questioning appellant about his desire for counsel. Before resuming questioning, they briefly reminded appellant of his rights

but did not repeat the advice in full or execute another written waiver. SA Sentell testified that, a short time later, at approximately 6:57 p.m., appellant said, "I think I want a lawyer before I say anything else." At that point questioning ceased. SA Sentell testified, "That was the end of the interview, and we called the ship."

Appellant described his comment about a lawyer during the November 4 interview as follows:

> Well, they were talking to me, and I said, "Well, I'd like a lawyer," and they said, "We'll take a break," and they walked out and left me handcuffed to the chair, and an older guy came in and stood by the door watching me.

Appellant testified further that, after a short break, "They came back in and started questioning me again."

SA Clark testified that appellant orally denied killing Shackleton. Appellant initially said that his girlfriend was with him at the club, but when confronted with her denial that she was at the club on the night of October 2, appellant said that he was at the club "with three other friends."

The defense made timely motions to suppress the pool cues surrendered by appellant on October 20 and the results of the November 4 interrogation. The military judge denied both motions to suppress.

The October 20 Interview

Appellant contends that the military judge erred by refusing to suppress the fruits of the October 20 interview, including appellant's production of the pool cues and his explanation for the spot on the pool cue case. Appellant argues that he was a suspect on October 20 and that failure to advise him of his rights as a suspect made the fruits of the interview inadmissible.

Whether a person being interviewed is a "suspect" is a question of law. *United States v. Good,* 32 MJ 105, 108 (CMA 1991). The military judge's factual determinations pertaining to what criminal investigators knew at the time of the interview will be upheld unless "clearly erroneous"; but the legal issue whether the person being interviewed was a suspect will be reviewed *de novo. Id.; United States v. Uribe-Velasco,* 930 F.2d 1029, 1032 (2d Cir. 1991). If a criminal "investigator suspects or reasonably should suspect" a person "of a crime, then rights' warnings are required." *United States v. Schake,* 30 MJ 314, 317 (CMA 1990).

We hold that appellant was not a suspect when he was interviewed on October 20. The NIS had determined that a pool cue was the probable murder weapon, but they were still trying to determine how many patrons of the Enlisted Mens' Club had privately owned pool cues. As of October 20, they had obtained one or two; appellant's was the second or third. They did not know how many they eventually would find. They ultimately found a total of four. Appellant's "intimate information" about the murder was attributed to third parties. Appellant was a known disciplinary problem, but his bizarre comments about killing someone appeared to be directed at the police, not fellow pool players. Furthermore, appellant's comments concerned shooting someone, but the NIS was not investigating a shooting death. We agree with the military judge that, as of October 20, the investigation had not sufficiently narrowed to make appellant a suspect within the meaning of Article 31.

The Novembrer 4 Interview

Appellant contends that the fruits of the November 4 interview should not have been admitted in evidence

because they were obtained after he requested a lawyer. We hold that the limited results of the November 4 interview were properly admitted in evidence.

When an accused has invoked his right to have counsel present during a custodial interrogation, questioning must cease. *United States v. Applewhite,* 23 MJ 196, 198 (CMA 1987). The conflict between SA Sentell's description of what appellant said during his interrogation and appellant's description of what he said raised a ;question of fact which the military judge resolved against appellant. The military judge did not believe appellant's description of an unequivocal invocation of his right to counsel. Instead, he found that "the mention of a lawyer by the accused during the course of the interrogation to have been not in the form of a request for counsel and that the agents properly determined that the accused was not indicating a desire for or invoking his right to counsel."

The military judge's findings of fact should not be disturbed unless unsupported by the record or clearly erroneous. *United States v. Burris,* 21 MJ 140, 144 (CMA 1985), citing *United States v. Middleton,* 10 MJ 123, 133 (CMA 1981). In this case the military judge's rejection of appellant's assertion that he told the NIS, "I'd like a lawyer," is a finding of fact. The question whether appellant's statement, "Maybe I should talk to a lawyer," invoked his right to counsel is a question of law. We hold that, because this comment by appellant did not unequivocably invoke his right to counsel, the NIS agents properly conducted further limited questioning to clarify appellant's ambiguous comment.

Some jurisdictions have held that any mention of counsel, however ambiguous, is sufficient to require that all questioning cease. Others have attempted to define a threshold standard of clarity for invoking the

right to counsel and have held that comments falling short of the threshold to not invoke the right to counsel. Some jurisdictions, including several federal circuits, have held that all "all interrogation" about the offense "must immediately cease" whenever a suspect mentions counsel, but they allow interrogators to ask "narrow questions designed to 'clarify' the earlier statement and the accused's desires respecting counsel." *See Smith v. Illinois*, 469 U.S. 91, 96 n. 3, 105 S.Ct. 490, 493 n. 3, 83 L.Ed.2d 488 (1984) (summarizing approach taken by various jurisdictions to ambiguous references to counsel). The Supreme Court has not yet resolved the issue. *Id.*

Not every vague reference to counsel requires termination of the interrogation. An ambiguous reference to counsel must, however, be clarified before interrogation may continue. *United States v. Mendoza-Cecelia,* 963 F.2d 1467, 1472 (11th Cir. 1992); *United States v. Fouche,* 833 F.2d 1284, 1287 (9th Cir. 1987), *cert. denied,* 486 U.S. 1017, 108 S.Ct. 1756, 100 L.Ed.2d 218 (1988); *United States v. Cherry,* 733 F.2d 1124, 1130 (5th Cir. 1984). *Cf. United States v. Sager,* 36 MJ 137, 145 (CMA 1992) (limited questioning permitted to clarify whether ambiguous conduct was intended to invoke right to silence). Further questioning is limited to clarifying the suspect's desires regarding counsel. The interrogator may not attempt to persuade the suspect that counsel is not necessary or desirable, or presume to tell the suspect what counsel's advice is likely to be. *United States v. Cherry,* 733 F.2d at 1130.

In this case, appellant's comment, "Maybe I should talk to a lawyer," required clarification. *See United States v. Cherry,* 733 F.2d at 1130 ("Maybe I should talk to an attorney before I make a further statement."). SA Sentell immediately stopped questioning appellant about

the murder and limited her questioning to appellant's comment about counsel. After appellant said, "No, I don't want a lawyer," the interrogators took a break, allowing appellant to consider his situation. After the break, they briefly reminded appellant of his rights before continuing the interrogation. *Cf. Maglio v. Jago,* 580 F.2d 202, 206 (6th Cir. 1978) ("If the police had reexplained Maglio's rights and then withdrawn, allowing the boy to consider his alternatives, and he had then initiated further communication with the police, we would be able to find a waiver. . . ."). Under the circumstances, we agree with the military judge's ruling that appellant did not invoke his right to counsel at this point in the interrogation.

The decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

Chief Judge SULLIVAN and Judges COX, CRAWFORD, and WISS concur.

APPENDIX B

IN THE U.S. NAVY-MARINE CORPS COURT OF MILITARY REVIEW

BEFORE

C. H. MITCHELL J.A. FREYER F. D. HOLDER

UNITED STATES

v.

ROBERT L. DAVIS, 302 60 5400
OPERATIONS SPECIALIST SEAMAN APPRENTICE (E-2),
U.S. NAVAL RESERVE

NMCM 89 2569 Decided 16 September 1991

Sentence adjudged 13 April 1989. Military Judge: Sebastian Gaeta, Jr. Review pursuant to Article 66(c), USMJ, of General Court-Martial convened by Commander, Naval Base, Charleston, SC 29408-5100.

LT MARY ANNE RAZIM, JAGC, USNR, Appellate Defense Counsel
LT KIRK A. LUDWIG, JAGC, USNR, Appellate Government Counsel
LT L. LYNN JOWERS, JAGC, USN, Appellate Government Counsel
LCDR NEAL H. NELSON, JAGC, USNR-R, Appellate Government Counsel

PER CURIAM:

The appellant was convicted of unpremeditated murder for killing another servicemember by striking him in the head with a pool cue. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances, and confinement for life. The convening authority approved the adjudged sentence. He has raised several assignments of error[1], of which we discuss only the first.

Whether or not the appellant was a suspect when the questioning by the Naval Investigative Service leading to production of the pool cue took place depends upon the totality of the circumstances known to investigators at the time. Information, however, need not be only

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[1] I. THE MILITARY JUDGE ERRED BY IMPROPERLY DENYING APPELLANT'S PRETRIAL MOTIONS TO SUPPRESS HIS UNWARNED STATEMENTS TO NAVAL INVESTIGATIVE SERVICE [NIS] AGENTS AND EVIDENCE DERIVED THEREFROM.

II. THE MILITARY JUDGE ERRED BY IMPROPERLY DENYING APPELLANT'S MOTION TO SUPPRESS STATEMENTS OBTAINED BY NIS AGENTS IN VIOLATION OF APPELLANT'S RIGHT TO COUNSEL.

III. TRIAL COUNSEL'S INAPPROPRIATE SENTENCING ARGUMENT HAS TAINED APPELLANT'S SENTENCE.

IV. THE MILITARY JUDGE ERRED BY DENYING TRIAL DEFENSE COUNSEL'S REQUEST FOR AN ADDITIONAL INSTRUCTION ON REASONABLE DOUBT.

V. THE MILITARY JUDGE ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS HIS UNWARNED ADMISSIONS TO A PETTY OFFICER.

THE MILITARY JUDGE ERRED BY DENYING TRIAL DEFENSE COUNSEL'S REQUEST TO REOPEN THE ARTICLE 32 INVESTIGATION.

additive or neutral; some, by virtue of its exculpatory nature, may subtract from or diminish that which is inculpatory so as to neutralize suspicion which might otherwise exist. In fact, the potential of further information, if exculpatory, to vitiate otherwise existing probable cause has been so well recognized that material omission of such information from an affidavit has been placed on an equal footing with insertion of false statements as a basis for challenging the validity of a warrant. *United States v. Pace,* 898 F.2d 1218, 1232-33 (7th Cir. 1990). Hence, it will not do merely to enumerate circumstances which, in isolation, might give rise to suspicion; the totality of the circumstances known to the investigators, including any exculpatory information, must be considered.

In this case, the investigators had information from which a reasonable person might have suspected the appellant of some involvement; but they also had information in the form of reported statements of the appellant from which any reasonable person would conclude that the appellant, although knowledgeable, could not have been the murderer. We do not see any way that the appellant's statements that he had heard of how the victim might have been killed could be interpreted otherwise than as a denial of personal involvement and guilt on his own part. Since no other information focused with particularity upon the appellant as the only likely perpetrator, we think that the appellant's inferential denials of involvement, when considered with the other information, resulted in a condition of objective non-suspicion on the part of the Naval Investigative Service. Consequently, even if the production of the pool cue is deemed derivative of interrogation, we hold that warnings were not initially required under all the circumstances of this case.

The assignments of error are without merit. We are convinced of the appellant's guilt, which he has admitted on at least two occasions, beyond a reasonable doubt, and we deem the sentence appropriate for this wanton and senseless homicide. Accordingly, the findings of guilty and the sentence, as approved on review below, are affirmed.

C. H. Mitchell, Senior Judge

J. A. Freyer, Judge

F. D. Holder, Judge

QUESTION PRESENTED

Whether a law enforcement officer may ask questions limited to clarifying a suspect's wishes when the suspect makes an ambiguous comment regarding counsel during a custodial interrogation.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1949

ROBERT L. DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Military Appeals, Pet. App. 1a-11a, is reported at 36 M.J. 337. The opinion of the Navy-Marine Corps Court of Military Review, Pet. App. 12a-15a, is not officially reported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on March 11, 1993. The petition for a writ of certiorari was filed on June 8, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Petitioner Davis, a member of the United States Navy, was convicted at a general court-martial on one specification of unpremeditated murder, in violation of Article 118 of the Uniform Code of Military Justice, 10 U.S.C. 918. He was sentenced to confinement for life, a dishonorable discharge, forfeiture of all pay and allowances, and a reduction in rank to pay grade E-1. The convening authority approved the findings and sentence. The Navy-Marine Corps Court of Military Review affirmed. Pet. App. 12a-15a. The Court of Military Appeals granted discretionary review and affirmed. Pet. App. 1a-11a.

1. On the evening of October 2, 1988, Seaman Keith Shackleton played pool with petitioner in the Enlisted Mens' Club at the United States Naval Base, Charleston, South Carolina. Tr. 583, 606, 619-620, 639-641, 714, 728, 746-747. Shackleton lost the game and a $30 wager, but he refused to pay. After the club closed, petitioner killed Shackleton by beating him with a pool cue on the loading dock of the commissary, a short distance from the club. Tr. 714, 728, 746-747. Shackleton's body was found early the next morning by a milk delivery man. Tr. 662.

In the first stage of the ensuing investigation, some 150-250 sailors were interviewed, including petitioner. Tr. 136. During petitioner's first interview on October 20, 1988, petitioner said that he was at the Enlisted Mens' Club playing pool on the night of the murder. AXs 28, 36; Tr. 165, 792-796. Petitioner said that he recognized a photograph of Shackleton and believed that he had played pool with him. Tr. 792-796. He also said that two individuals named Wade Bielby and Bonnie Krusen had told him about Shackleton's

murder just three days after it happened and had told him that Shackleton had been "beaten with a pool stick." Tr. 65, 792-796.[1] At the end of the interview, petitioner agreed to turn his pool cues over to the Naval Investigative Service (NIS) agents. *Ibid.*[2] While surrendering his two pool cues and their case, petitioner pointed out a stain that he said he thought was either his blood or catsup. AX 28; PX 7; Tr. 795-796.

As the investigation continued, NIS agents discovered that shortly after Shackleton's murder, petitioner told several fellow sailors that he had committed the crime. Petitioner's account of the murder involved details of the crime that only the murderer would have known, or otherwise clearly indicated that he had been involved in the murder. For example, on October 5, 1988, in a conversation that petitioner had with Petty Officer David Guidry, Guidry said he had heard that Shackleton had died by falling and injuring his head. Petitioner corrected Guidry, stating that Shackleton had been "beat up and stuck with a pool cue." Tr. 269-270, 702. In addition, on October 27, petitioner told Petty Officer Ronald Mull that NIS was investigating petitioner for the murder of the man killed behind the commissary. Tr. 746. When asked directly if he did it, petitioner told Mull, "Yes, I did." *Ibid.* Petitioner told Mull that he

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[1] Both Krusen and Bielby testified that they had not discussed Shackleton's murder with petitioner during that time period. Tr. 852-853, 855.

[2] NIS agents had been looking for people who owned their own pool cues based on preliminary indications that Shackleton's injuries were consistent with being struck by a pool cue. Tr. 118, 123. NIS obtained cues from several individuals during the investigation. Tr. 125.

was playing pool at the Enlisted Mens' Club and "beat the guy out of $30.00" and that the "guy" did not want to pay. Tr. 747. The two had an argument, and they ended up outside the club. *Ibid.* Mull testified that petitioner related the following, *ibid.*:

> He said that he hit the guy with a pool—his pool stick a couple of times and he said he thought he put one of the guy's eyes out; said it was messed up pretty bad. He said—I don't know exactly where he was at, but he said that he drug the guy's body behind the commissary and then he said he ran down into the woods and left the base somehow. * * * He said he went to a girlfriend's house. * * *

Petitioner told Mull that he had an alibi; he was seen by several people with "some girl" at the club. Petitioner also said that NIS had taken his pool cues and that one of them had a blood stain that he had tried to wash off and erase with sandpaper. Petitioner said he was not worried, however, because he had the same blood type as the victim. *Ibid.*[3] Petitioner also made various other, similar incriminating statements.[4]

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[3] Petitioner was wrong. His blood type is B; Shackleton's was O. Tr. 907, 908, 914.

[4] On October 19, 1988 (the day before NIS first interviewed petitioner), petitioner told Petty Officer Steven Brothers that he had been accused of murder. Tr. 274, 707. When Brothers asked why, petitioner said that the authorities had found someone dead on the base, that he had played pool with the victim the night before, and that the authorities were accusing him of beating the victim with a pool cue. Tr. 274, 708.

One day in October 1988, petitioner told Petty Officer Richard Kuhn that NIS had taken his pool cues because he had played pool with this "guy." Petitioner also stated that the "guy" owed him money after the game but did not pay, so petitioner hit him over the head with a pool cue. Tr. 288, 714. Petitioner also told Kuhn that he did not know whether the victim had died, and that he did not care. *Ibid.*

In mid-October 1988, when asked why he was not playing pool, petitioner told Petty Officer Walter Crayton Black that NIS had taken his pool cues. Tr. 272, 728. Petitioner explained that someone had been killed on the base, that he had been playing pool with him, that he was the last one seen with him at the Enlisted Mens' Club, and that he had won $30 from the victim but had no reason to be involved in the murder. *Ibid.*

With those statements in hand, NIS agents arrested petitioner on November 4. Tr. 295.[5] After receiving the appropriate warnings both orally and in writing, petitioner agreed to talk with two NIS agents. AXs 37, 38, 40; Tr. 295-296, 324-325. When asked if he wanted to have a lawyer present, petitioner specifically declined. AX 40; Tr. 295.

During the first part of the interview, petitioner described his activities during October 1 and 2, 1988. AXs 38, 40; Tr. 957-958. Specifically, petitioner stated that he was at the Enlisted Mens' Club with his girlfriend. He said he may or may not have played pool, but that he always has his pool cues with him. *Ibid.* Petitioner said that he subsequently went to an off-base nightclub called "J.W.'s" and then to his girlfriend's house. *Ibid.*

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[5] Petitioner was arrested as he was released from a psychiatric evaluation that his command had ordered because he had made statements on March 3, 1988, to the effect that he wanted to kill someone just to see what it was like. AX 31; Tr. 207-208, 1102-1103. In addition, he also told his division officer on October 20, 1988, that he felt like shooting someone, "[b]etter yet, a cop because then I know [they] will kill me." AX 33; Tr. 775. The latter statement was not admitted at trial. *Ibid.*

The NIS agents confronted petitioner with his girlfriend's statement that she was not at the Enlisted Mens' Club that night. Tr. 958-959. Petitioner then changed his story, saying that he was at the Enlisted Mens' Club with some friends. AXs 38, 40; Tr. 959. NIS then confronted petitioner with a statement indicating that he had won $30 playing pool with Shackleton. AXs 38, 40; Tr. 960. Petitioner denied playing pool with Shackleton and denied winning $30. *Ibid.* Petitioner explained the presence of a bloody t-shirt in his locker as the result of the extraction of wisdom teeth.[6]

About 80 minutes into the interview, petitioner said, "Maybe, I should talk to a lawyer." AXs 38, 40; Tr. 297, 304, 309, 324. The agents immediately stopped all questioning of petitioner and sought to clarify his request. Specifically, as Special Agent Sentell testified:

> [I] made it very clear that we're not here to violate his rights, that if he wants a lawyer, then we will stop any kind of questioning with him, that we weren't going to pursue the matter unless we have it clarified is he asking for a lawyer or is he just making a comment about a lawyer, and he said, "No, I'm not asking for a lawyer," and then he continued on, and said, "No, I don't want a lawyer," and then he said he didn't kill the guy and he said that he was the type of person that if he did kill the guy, he'd have to tell someone about it.

Tr. 310; see also Tr. 307, 313, 315, 316, 324-325, 331-332.

[6] The extraction was confirmed by petitioner's oral surgeon and by forensic testing establishing that petitioner's blood, not the victim's, was on the t-shirt. DX K; Tr. 1260-1261.

After confirming that petitioner did not want a lawyer, the agents recessed for a short break. Tr. 297, 304. Petitioner was asked if he wanted a drink or a cigarette. Tr. 297, 303, 329.[7]

At the beginning of the second portion of the interview, Special Agents Clark and Sentell reminded petitioner that he still enjoyed the rights about which he previously had been advised. Tr. 304-305, 329. Petitioner began to discuss a conversation that he had had with Petty Officer Guidry, during which he told Guidry that the man who died behind the commissary had been killed with a pool cue. When asked why he said that, petitioner said he liked to "mess" with people and make them think he knew more than they knew. AXs 38, 40; Tr. 961. When asked why he said that the man had been "hit and jabbed," petitioner said that he had added that detail in order to make his description sound more realistic. Petitioner then changed his story, stating that Bielby had told him the details about the pool cue. *Ibid.*

Petitioner said that he knew who had killed Shackleton, and he named one "Jeff Kaiser." AXs 38, 40; Tr. 961. Petitioner's basis for that opinion was that Kaiser did not go to the club for almost a month after the murder because Kaiser was scared and because he had been "doing acid" that night and may have done something he did not remember. *Ibid.* Petitioner finally said that if he had killed someone, he would have had to tell somebody. AX 40; Tr. 961. The NIS agents then confronted petitioner with the fact that he *had* told someone, and that individual had

[7] Petitioner also used the bathroom once during the interview. Tr. 333.

provided a sworn statement to NIS. Tr. 316. At that point, petitioner said, "I think I want a lawyer before I say anything else." The agents immediately terminated the interview. Tr. 310-311; see also AX 40; Tr. 307, 312-314, 316, 332.

2. Before trial, petitioner moved to suppress his statements. AX 9, No. 20. The trial judge held an evidentiary hearing on the motion. The government's witnesses testified that petitioner had been properly advised of his rights; that during the questioning he made an ambiguous statement regarding counsel; that the NIS agents ceased their questioning once petitioner made that statement; that petitioner then denied wanting to speak with counsel; and that when petitioner later asked to speak to an attorney, all questioning ceased. Petitioner gave a different version of the events.[8]

After the hearing, the trial judge denied petitioner's motion. Specifically, the trial judge determined, Tr. 342:

[8] According to petitioner, the agents "were talking to me, and I said, 'Well, I'd like a lawyer,' and they said, 'We'll take a break,' and they walked out and left me handcuffed to the chair." Tr. 319. Petitioner said that later "[t]hey came back in and started questioning me again." *Ibid.* Petitioner indicated that, notwithstanding the fact that he understood he had a right to a lawyer, he didn't pursue getting a lawyer when questioning began again because he "really did not understand * * * what was going on." Tr. 321. Petitioner stated that he asked for a lawyer again later using the same words, "I want a lawyer," at which time questioning stopped for the most part. Tr. 321-322. Based on that evidence, petitioner argued that the government had not established a valid waiver of rights at the initiation of the interview and that he had requested and been denied counsel during the interview, in violation of *Edwards* v. *Arizona*, 451 U.S. 477 (1981). Tr. 338-340.

> I think that pursuant to Military Rule of Evidence 304 that the accused was properly advised of his rights pursuant to Article 31 and the cases of *Miranda* and *Tempia*, and that he intelligently and freely waived those rights. Moreover, I find that the mention of a lawyer by the accused during the course of the interrogation to have been not in the form of a request for counsel and that the agents properly determined that the accused was not indicating a desire for or invoking his right to counsel. The motion to suppress the 4 November '88 statement is accordingly denied.

3. The Navy-Marine Corps Court of Military Review unanimously affirmed the findings and sentence. Pet. App. 12a-15a. Without comment, the court rejected the error raised here, among others, as meritless.

4. The Court of Military Appeals affirmed. Pet. App. 1a-11a. The court determined that petitioner had made only a "vague" or "ambiguous" reference to counsel and that it "required clarification." *Id.* at 10a. Following the majority of other federal courts that have considered this question, the court held that law enforcement authorities may make limited inquiries in order to clarify such an ambiguous reference to counsel by a person who is being subjected to a custodial interrogation. *Ibid.* Applying that rule to the facts of this case, the court found that the NIS agents' inquiries were appropriately limited to that purpose, and that their conduct did not interfere with petitioner's right to counsel under *Miranda*. *Id.* at 10a-11a.

ARGUMENT

Petitioner urges this Court to grant certiorari to decide whether a law enforcement officer may make a limited inquiry of a suspect who has made an ambiguous remark about counsel during a custodial interrogation in order to clarify whether the suspect wishes the assistance of counsel. While we agree with petitioner that there is some disagreement among the lower courts on this question, *Mueller* v. *Virginia*, 113 S. Ct. 1880, 1881 (1993) (White, J., dissenting from the denial of certiorari), there is no need for the Court to resolve that disagreement here.

As this Court has noted, the lower courts have taken three approaches to determining whether law enforcement officers may question a suspect if he has made an ambiguous reference to counsel during custodial interrogation. The approaches are: (1) to require the officers to cease all questioning once a suspect refers to counsel, however ambiguous that reference may be; (2) to require the officers to cease further interrogation, but to allow them to ask the suspect questions limited to clarifying his desires with respect to counsel; and (3) to permit the officers to continue the interrogation until the suspect makes an unambiguous request for an attorney. *Smith* v. *Illinois*, 469 U.S. 91, 95-97 n.3 (1984).

In this case, the Court of Military Appeals approved the use of limited, clarifying questions when a suspect makes an ambiguous reference to a lawyer. That approach accommodates the interests of suspects and law enforcement. It vindicates a suspect's interest in avoiding the type of police badgering that is the justification for the bright-line rule of *Edwards*, see *McNeil* v. *Wisconsin*, 111 S. Ct. 2204, 2208 (1991); *Minnick* v. *Mississippi*, 498 U.S. 146, 150 (1990); *Michigan* v. *Harvey*, 494 U.S. 344, 350 (1990); *Oregon* v. *Bradshaw*, 462 U.S. 1039, 1044 (1983) (plurality opinion), without requiring him to state with precision that he wishes to consult with an attorney before further questioning. At the same time, it permits law enforcement officers to undertake a reasonable inquiry in order to discern what a suspect truly desires once he makes an ambiguous reference to an attorney. Cf. *Michigan* v. *Mosley*, 423 U.S. 96, 102 (1975) ("a blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of the circumstances, would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests.").[9] It is a mistake to assume that every suspect's ambiguous reference to an attorney indicates a desire to deal with the police only through a lawyer. As the en banc Fifth Circuit has observed: "While the suspect has an absolute right to terminate station-house interrogation, he also has the prerogative to then and there answer questions, if that be his choice. Some persons are moved by the desire to unburden themselves [by] confessing their crimes

[9] Notably, even in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), the Court recognized that a suspect's invocation of his rights might be equivocal. The Court cited with approval practices of the FBI relayed to the Court in a letter from Solicitor General Thurgood Marshall: "If he is indecisive in his request for counsel, there may be some question on whether he did or did not waive counsel. Situations of this kind must be necessarily left to the judgment of the interviewing Agent." 384 U.S. at 485.

to police, while others want to make their own assessment of what to say to their custodians." *Nash* v. *Estelle*, 597 F.2d 513, 517 (en banc), cert. denied, 444 U.S. 981 (1979). For those reasons, it is unsurprising that the majority of the federal courts of appeals that have addressed this issue have endorsed the common-sense approach approved by the Court of Military Appeals in this case. See, *e.g.*, *United States* v. *Mendoza-Cecelia*, 963 F.2d 1467, 1472 (11th Cir.), cert. denied, 113 S. Ct. 436 (1992); *United States* v. *Gotay*, 844 F.2d 971, 975 (2d Cir. 1988); *United States* v. *Fouche*, 776 F.2d 1398, 1405 (1985), appeal after remand, 833 F.2d 1284, 1287 (9th Cir. 1987), cert. denied, 486 U.S. 1017 (1988); *United States* v. *Porter*, 776 F.2d 370 (1st Cir. 1985) (en banc); *Nash* v. *Estelle*, 597 F.2d 513, 517 (5th Cir. 1979); cf. *United States* v. *Riggs*, 537 F.2d 1219, 1222 (4th Cir. 1976).

The Sixth Circuit adopted a contrary rule in *Maglio* v. *Jago*, 580 F.2d 202, 205 (1978), where it held that law enforcement officers must halt all questioning of any type of a suspect who has made even an ambiguous reference to counsel. There is no need, however, to resolve the disagreement between *Maglio* and the rule in the other circuits. The Sixth Circuit adopted its rule before this Court decided *Oregon* v. *Bradshaw*, *Michigan* v. *Harvey*, *Minnick* v. *Mississippi*, and *McNeil* v. *Wisconsin*. In each of those cases this Court made clear that the justification for the bright-line rule of *Edwards* v. *Arizona* was the need to prevent the police from badgering a suspect into waiving his right to counsel. The limited type of inquiry approved by the Court of Military Appeals in this case and by the majority of the federal courts of appeals is not likely to lead to the type of badgering with which this Court was concerned in *Edwards*. It

therefore is appropriate to afford the Sixth Circuit the opportunity to revisit the question before this Court undertakes to answer it.

Following that course will not prejudice petitioner, because his conviction would be upheld regardless of the approach endorsed by this Court. The reason is that any error in the admission of the statements that petitioner made after his ambiguous reference to counsel was harmless beyond a reasonable doubt.

The statements that petitioner made after his ambiguous reference to a lawyer were inconsequential. After that point in questioning, petitioner merely repeated what he had previously told the NIS agents about his October 5 conversation with Petty Officer Guidry about how Shackleton had died. In addition, petitioner asserted that a "Jeff Kaiser" had killed Shackleton. See AXs 38, 40; Tr. 961. Those limited and basically non-inculpatory remarks consisted of less than half a page of testimony in a trial record that was more than 700 pages in length.

That evidence was insignificant when compared to the proof of petitioner's guilt adduced at trial. For example, the government presented five witnesses who placed both petitioner and Shackleford at the Enlisted Mens' Club on the night of the murder. Tr. 579-585, 606-607, 619-620, 639-641, 648. Forensic evidence also tied petitioner to the crime. A forensic chemist, Judith Flynn, testified that petitioner's blood type was B and that Shackleton's was O. PX 21; Tr. 907, 914. Flynn found blood of the victim's type on petitioner's pants and spots of blood on petitioner's tennis shoes. PX 23; Tr. 911-912. A human blood stain also was found on petitioner's pool cue case. PX 21; Tr. 906. Moreover, at various times petitioner made statements to fellow sailors in which he either

specifically admitted assaulting Shackleton, or otherwise clearly implicated himself in that crime. Lieutenant Moss and Petty Officers Guidry, Stephen Brothers, Scott Richard Kuhn, and Walter Crayton Black recounted petitioner's various incriminating statements. Petty Officer Ronald Mull also retold petitioner's confession in which he admitted murdering Shackleton because Shackleton had reneged on a wager. Tr. 702, 707-708, 714, 728, 746-747, 1103. Petitioner also gave the NIS agents false exculpatory statements when he said that he had learned about the facts of the crime from one Everett Wade Bielby and one Bonnie Krusen, neither of whom spoke with petitioner during the relevant period, and when he said that he had spent the night of the murder with his girlfriend, who denied that claim. Tr. 852-853, 855, 957-958.

In sum, the record evidence overwhelmingly establishes that petitioner beat Keith Shackleton with a pool cue, causing him to fall and suffer fatal head injuries. Admission of the one-half page of non-inculpatory information obtained after petitioner's comment about counsel could not have had a material effect on the outcome.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

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BRETT D. BARKEY
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AUGUST 1993

No. 92-1949

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ROBERT L. DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED JUNE 8, 1993
CERTIORARI GRANTED NOVEMBER 1, 1993

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ROBERT L. DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

INDEX TO JOINT APPENDIX

TESTIMONY ON MOTION TO SUPPRESS POOL CUES*

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* Errors which appear in the joint appendix, and marks on several of the appellate exhibits, appear in the original record of trial.

TESTIMONY ON MOTION TO SUPPRESS STATEMENTS TO NIS

CHRONOLOGY OF PROCEEDINGS

Event	*Date*
Court-Martial Charges:	
Charges Preferred:	11 January 1989
Charges Referred to Court-martial:	11 January 1989
Charges Served on Petitioner:	11 January 1989
Court-Martial Proceedings:	
Petitioner Arraigned:	13 March 1989
Motions to Suppress Presented, Argued, and Decided:	15 and 16 March 1989
Evidence on the Merits Begun:	20 March 1989
Verdict Announced:	12 April 1989
Sentence Announced:	13 April 1989
Post-Trial Action:	
Staff Judge Advocate's Recommendation to the Convening Authority made:	29 June 1989
Convening Authority's Court-martial Order and Action promulgated:	24 July 1989
at the Navy-Marine Corps Court of Military Review:	
Case Docketed:	10 August 1989
Defense Assignments of Error and Brief filed:	06 March 1990
Government Reply to Defense Assignments of Error and Brief filed:	02 May 1990
Defense Response to Government Reply Filed:	07 May 1990

(Note: this pleading was misdated as March when filed).

CHRONOLOGY OF PROCEEDINGS – Continued

Event	*Date*
at the Navy-Marine Corps Court of Military Review (continued):	
Issue Specified and Ordered Briefed by Court:	24 January 1991
Defense Brief on Specified Issue filed:	25 February 1991
Government Reply to Defense Brief on Specified Issue filed:	27 March 1991
Defense Response to Government Reply filed:	11 May 1991
Case Argued before Court:	13 June 1991
Case Decided:	16 September 1991
at the United States Court of Military Appeals:	
Petition for Grant of Review Filed by Petitioner:	19 November 1991
Supplement to the Petition for Grant of Review filed:	20 December 1991
Government's Opposition to Petition for Grant of Review filed:	30 December 1991
Review Granted by Court:	11 February 1992
Defense Brief filed:	12 March 1992
Government Brief filed:	13 April 1992
Case Argued before Court:	03 November 1992
Case Decided:	11 March 1993

MIDSOUTH JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES OF AMERICA

versus

ROBERT L. DAVIS, OSSA, USN

MOTION TO SUPPRESS STATEMENTS

COMES NOW the Defendant, Robert L. Davis, through his undersigned attorneys, does hereby moves [*sic*] to suppress any and all written or oral statements or admissions which the Government intends to introduce at the Defendant's trial, and which the Government contends were made by the Defendant. The within Motion is made on the grounds that any such statements were not intelligently, knowingly and voluntarily made and were obtained in violation of the Defendant's rights against self-incrimination and rights to counsel as guaranteed by the Constitution of the United States of America.

Furthermore, the Defendant demands strict proof that any statement given was made subsequent to the Defendant being advised of his rights pursuant to Article 31, UCMJ, 10 U.S.C. 3831.

/s/ Andrew J. Savage, III
ANDREW J. SAVAGE, III
Civilian Counsel

D. S. YANDLE
LT, JAGC, USN
Detailed Defense Counsel

MIDSOUTH JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES OF AMERICA

versus

ROBERT L. DAVIS, OSSA, USN

MOTION TO SUPPRESS EVIDENCE

COMES NOW the Defendant, Robert L. Davis, through his undersigned attorneys, does hereby moves [*sic*] the Court for an Order suppressing from evidence at Defendant's trial, pool cues illegally obtained from the Defendant.

On or about October 20, 1988, the Defendant was approached by NIS agents and was questioned as to his possession and ownership of pool cues. At that time, NIS considered a contributing cause of death of the decedent in question to be blunt head trauma. Accordingly, NIS considered the Defendant as a suspect, as evidenced by its request to Defendant that he turn over the pool cues owned by him.

The Defendant, however, was not given his rights under Article 31, UCMJ, 10 U.S.C. Section 831, prior to his interrogation by the NIS agents. Since the Defendant was not advised that he was a person suspected of an offense, that he had the right to remain silent, and that any statement made could be used against him, the evidence seized should be suppressed. [10 U.S.C. Section 831(d)]. The Defendant's action of turning over the pool cues constitutes a communicative act for the purposes of Article 31. More-

over, the failure to advise the Defendant of these rights should render any consent by the Defendant invalid under the totality of the circumstances involved.

WHEREFORE, the Defendant requests these pool cues be suppressed from evidence at the Defendant's trial. The Defendant intends to present evidence and desires to make oral argument in support of this Motion.

/s/ Andrew J. Savage, III
ANDREW J. SAVAGE, III
Civilian Counsel

D. S. YANDLE
LT, JAGC, USN
Detailed Defense Counsel

I hereby certify that a copy of the above motion was served upon trial counsel this ____ day of March 1989.

D. S. YANDLE
LT, JAGC, USN

MIDSOUTH JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES

v.

ROBERT L. DAVIS, OSSA, USN

RESPONSE TO MOTION TO SUPPRESS STATEMENTS

Comes now the United States in response to Defendant's motion to suppress statements. Defendant's motion lacks specificity, failing to identify the statements or admission in question or to specify "facts" underlying Defendants position that all statements/admissions were not intelligently, knowingly or voluntarily made, and were obtained in violation of Defendants right against self-incrimination and right to counsel.

To the extent Defendant's motion may cover Defendant's conversation with OS2 Ronald S. Mull, the Government incorporates its response to Defendant's Motion to Suppress statement of Defendant to OS2 Mull herein.

To the extent the statement/admissions were made in the presence of various persons in the form of statements from the Defendant, where the person hearing the conversation neither initiated the conversation nor asked questions of the Defendant, no Article 31 warnings were required. *United States v. Duga,* 10 M.J. 206 (C.M.A. 1981); *United States v. Jones,* 24 M.J. 367 (C.M.A. 1987); *United States v. Richards,* 17 M.J. 1016 (N.M.C.M.R. 1984). Persons who heard statements from the Defendant, without asking questions or initiating the conversation

are no different than the informant who merely reports what is heard. An informant in such a situation has no obligation to provide the suspect with rights warnings, and none is required here. *Huffa v. United States,* 385 U.S. 293, 17 L ed 2d 374, 87 S Ct 408, reh denied 386 U.S. 940, 17 L ed 2d 880, 87 S Ct 970 (1966). Further, spontaneous statements made by Defendant, involving neither an interrogation or request for any statement, are admissible without Article 31(b) warning. *United States v. Barnes,* 19 M.J. 890 (A.C.M.R. 1985); *aff'd,* 22 M.J. 385 (C.M.A. 1985). *United States v. Willeford,* 5 M.J. 634 (A.F.C.M.R. 1978), *petition denied,* 6 M.J. 83 (C.M.R. 1979). A list of the statements/admissions which Defendant made spontaneously, were attached hereto.

To the extent Defendant's motion covers results of Defendant's interview by the Naval Investigative Service, the Defendant was given Article 31 warnings, and waived his right to remain silent. At one point in the interview when he indicated he might need to talk to an attorney, the agent stopped the interview and asked Defendant if he wanted an attorney present. Defendant stated he did not, initiated further conversation, and the interview proceeded.

To the extent Defendant's motion includes statements/admissions made while in the Naval Hospital, Charleston, South Carolina, to the extent they are not covered and listed above as spontaneous statements/admissions, the Government incorporates herein its reply to Defendant's motion to suppress evidence obtained during Defendant's stay at Naval Hospital, Charleston.

The Government desires oral argument on the motion.

/s/ Terrence J. Thompson
TERRENCE J. THOMPSON
CAPT, USMC
Trial Counsel

I hereby certify that a copy of this Answer was served on the defense counsel by hand delivery on 11th day of March 1989.

/s/ Terrence J. Thompson
TERRENCE J. THOMPSON
CAPT, USMC
Trial Counsel

MIDSOUTH JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES

v.

ROBERT L. DAVIS, OSSA, USN

RESPONSE TO DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

Comes now the United States in response to Defendant's motion to suppress evidence.

Article 31(b) prohibits the interrogation or request for a statement from an accused or a person *suspected* of an offense without first advising him of his rights.

On or about October 29, 1988, when Defendant was asked to provide his cue sticks, he was not a suspect, nor did the Naval Investigative Service (NIS) have any reason to suspect Defendant. Since NIS did not, and had no basis to, suspect Defendant, Article 31(b) warnings were not required prior to NIS's request for Defendant to provide his pool cues.

NIS's knowledge that the victim died from blunt head trauma, did not make Defendant a suspect. In fact NIS asked several individuals who had been playing pool in the Enlisted Men's Club the night of the victim's death to provide their pool cues. None of these individuals were provided Article 31(b) warnings because NIS did not have a suspect in the case. Further, Defendant, along with several other individuals, voluntarily provided NIS with their cue sticks.

In determining whether Defendant was a suspect at the time of the interview, the totality of the circumstances must be reviewed. *United States v. Anglin,* 40 C.M.R. 232, 235 (C.M.A. 1969); *United States v. Leifler,* 13 M.J. 337, 343 (C.M.A. 1982). Two questions must be answered, (1) did the interviewer suspect Defendant (subjective test), and (2) should the interviewer have suspected the accused (subjective case). *United States v. Ravenel,* 20 M.J. 842 (A.C.M.R. 1985), *R'vsd,* on other grounds, 26 M.J. 344, (C.M.A. 1988). At the time of the NIS request to Defendant for pool sticks, NIS did not suspect Defendant, nor did it have sufficient basis to suspect Defendant in the case, and no Article 31(b) warnings were required.

Defendant's motion to suppress the cue sticks should be denied.

The Government desires oral argument on the motion.

/s/ Terrence J. Thompson
TERRENCE J. THOMPSON
CAPT, USMC
Trial Counsel

I hereby certify that a copy of this Answer was served on the defense counsel by hand delivery on 11th day of March 1989.

/s/ Terrence J. Thompson
TERRENCE J. THOMPSON
CAPT, USMC
Trial Counsel

[115] MJ: Very well, which motion do you wish to take up at this time, counsel, please?

DC: Just a moment, sir.

MJ: Of course, sir.

[Defense counsel reviewed his documents.]

DC: It should be motion 20, the motion for appropriate relief in the form of suppressing oral statements and admissions, specifically we will be dealing with a statement made to the Naval Investigative Service on 20 October.

MJ: Was that reduced to writing?

DC: Yes, sir, it should be. Motions 20 and 21, sir. We will also be dealing with the introduction—with a motion to suppress the introduction of the pool cues.

MJ: Very well, sir. Are you ready to proceed on that one, Captain Thompson?

TC: Yes, sir, these are motions 20 and 21. Since the same investigative personnel were involved in both instances, the statement and the taking of the evidence, for reasons of expedience, the government would propose covering the 20th of October statements of the accused and the seizure of the pool cues on the 20th of October at the same time.

MJ: Any objection to that, counsel?

DC: No, sir, that's fine with the defense.

MJ: Very well, you may, of course, proceed, sir.

TC: At this time, the government would call Special Agent Keith Clark.

[116] Special Agent Keith Van Clark, Naval Investigative Service, was called as a witness for the government, was sworn and testified as follows:

DIRECT EXAMINATION

Questions by the prosecution:

Q. Please, state your full name.

A. Keith V. Clark.
Q. How do you spell your last name, sir?
A. C-L-A-R-K.
Q. Who is your employer?
A. The Naval Investigative Service.
Q. And how long have you been employed by the Naval Investigative Service?
A. Approximately five years.
Q. What are your duties with the Naval Investigative Service?
A. I'm a criminal investigator. My duties consist of investigating crimes and presenting facts.
Q. Special Agent Clark, do you know the accused in this case?
A. Yes, I do.
Q. If he's in the courtroom today, would you point to him and state his name.
A. [Doing as directed.] Yes, it's Robert Davis. He is sitting in the center of the left table.
TC: The record should reflect that the witness has correctly identified the accused.
Q. How do you happen to know Seaman Apprentice Davis?
A. Only through this investigation. He was developed as a suspect during the investigation.
Q. Directing your attention to October of 1988, were you conducting such an investigation at that time?
A. Yes, I was.
Q. What gave rise to the death investigation, just briefly?
A. On the morning of October the 3rd, the body of Keith Shackleton was found behind the commissary on the Naval Base. He had been injured, injuries to the head which resulted in his—and he was dead. [117] Injuries

resulted in his death. The investigation initiated at the time the body was discovered and an agent was dispatched to the scene.
Q. Directing your attention to about the 20th of October 1988, did you have occasion to see the accused about that date?
A. Yes, I did.
Q. And what was that occasion?
A. That was an occasion for collecting information. We wanted to talk to Robert Davis for information he may have as we believed him to have been in the club and might have valuable information in the investigation. It was a witness interview.
Q. You've just characterized the 20th of October interview with Seaman Davis as a witness interview. Earlier you testified that he, Seaman Davis, was developed as a suspect. When—was he a suspect on the 20th of October?
A. No, he was not. He was not developed as a suspect until later in the investigation. On the 20th of October, we had no reason to suspect him of any wrong doing.
Q. Where did you see Seaman Apprentice Davis on the 20th of October?
A. Went to the USS Mahan and saw him on board the ship in the Admiral's stateroom.
Q. Now, you testified earlier that at that time Seaman Apprentice Davis wasn't a suspect in this homicide investigation. Was NIS investigating him for anything else?
A. No, we were not.
Q. When you talked to him in the Admiral's stateroom, was anyone else present?
A. Yes, Special Agent Sentell and myself and, of course, Bob Davis.
Q. Prior to speaking with the accused, Seaman Apprentice Davis, did you give any sort of rights warnings?
A. No, we did not.

Q. And why not?

A. We had no reason to suspect him of any crimes at the time. There was nothing to warn him for.

Q. You've characterized Seaman Apprentice Davis as a witness at that time. What, if anything, within your investigation led you to Seaman Apprentice Davis as a witness?

A. Special Agent Sentell had talked to other people at the—which were patrons at the EM Club and had identified several people who owned personal pool cues. Robert Davis was one of those persons.

[118] Q. Did you talk to any of the other individuals that were identified?

A. Yes, we have. I have.

Q. Did NIS talk to any of those individuals before they talked to Seaman Apprentice Davis?

A. Yes.

Q. Now, when you talked to Seaman Apprentice Davis, what did the interview consist of? In other words, what was the direction of your questions?

A. It was the same set of standard questions we asked of all the witnesses that we were contacting: if he was at the club, meaning the EM Club on the night of 2 October; if he knew the victim; if he knew when—what time the victim left the club or if he saw him there. General inquiry-type questions.

Q. Now you mentioned earlier that you had obtained information that the accused was a club patron who owned—who played pool using his own pool cues. What was the significance of the pool cues?

A. At that time, we had reason to believe that the victim was possibly killed with an instrument which could have been a pool cue. The only cues that can come in and out of the club are personally owned pool cues.

Q. Did you have any reason to believe Seaman Apprentice Davis' pool cues were involved specifically?

A. No, we did not.

Q. Did Seaman Apprentice Davis speak to you voluntarily?

A. Yes, he did.

Q. Just to clarify that, did the CO or anyone in a supervisory position in his chain of command have to order him to talk to you?

A. No. I know of no such order.

Q. When you were speaking with him, was he restrained in any way by NIS?

A. No, he was not. He was—came into the room. He was told that—why we were there and what we were inquiring about and that he could leave any time he wanted to.

Q. At any time during this interview, did Seaman Apprentice Davis ask to terminate the interview?

A. No, he did not.

Q. About how long did this interview aboard the Mahan take?

A. Approximately 30 minutes.

[119] Q. Did the subject of cue sticks come up during that interview?

A. Yes, it did.

Q. Did the accused indicate whether or not he, in fact, owned any pool cue sticks?

A. Yes, in fact, he said he owned two sticks.

Q. Did he indicate where those sticks, those cue sticks, were?

A. Yes, he said he didn't have possession of them right then that they were at his girlfriend's house that she lived in MENRIV Housing.

Q. What happened after that?

A. After talking with Davis, we took Davis with us, again voluntarily, over to collect the pool sticks which he said were at his girlfriend's house.

Q. Did he volunteer to take you over there to get them?

A. Yes. He said that he had some problem as he was on restriction, couldn't get off the ship. I told him that that would not be a problem, that we could work that with the CO.

Q. Was he on restriction for anything related to this investigation?

A. No, that was totally unrelated to this investigation. I believe he had been UA.

Q. Did you, in fact, then go from the Mahan to MENRIV?

A. Yes, we did.

Q. And how did you get there?

A. We went by government vehicle.

Q. NIS vehicle?

A. Yes.

Q. And who all went to MENRIV?

A. It was Special Agent Sentell, myself and Robert Davis.

Q. Either when you were leaving the ship or on your way to MENRIV, was the accused restrained in any way?

A. No, he was not.

Q. Did he ask to return to the ship? On the way to MENRIV did he change his mind about going there?

A. Oh, no, he never asked to return to the ship or that he didn't want to go on with any more conversation. He didn't terminate in any fashion.

Q. Did any sort of interview occur on the way to MENRIV in the car?

A. It was mostly generally conversation, not case related.

[120] Q. What happened when you got to MENRIV?

A. When we got to MENRIV Housing, close to Albertha Heffner's residence, Davis showed us where the location of her particular residence was. We pulled up, stopped, Davis got out of the car and went directly to Heffner's vehicle, a red Fierro, opened the door and proceeded to get his pool sticks out of the, I believe it was the, back floorboard of the car.

Q. Did Davis proceed to this car by himself?

A. Yes.

Q. What happened after he got the pool sticks then?

A. After he got the cue sticks, he then handed them over to me. There were two cue sticks in one case.

Q. Did you tell him why you wanted the pool sticks?

A. Yes, I did.

Q. And what reason did you give him?

A. I told Davis that I wanted the pool sticks so that we could analyze them. I don't believe I used the word "analyze," but so we could further examine them.

Q. Did he have any reaction to that?

A. The only reaction he had was some concern on his pool case, and he, in fact, pulled out one of the pool sticks because he was evidently proud of the stick. It was a high value stick evidently. There was nothing on the stick that he pointed out, but he did point out a spot on the pool case.

Q. Was there anything to this point that Seaman Apprentice Davis had said or done that led you to look at him in a different light than when you'd first interviewed him that day as a witness?

A. No, to this point, I had no reason to look at him in any different light than we did when we began.

Q. When he handed you the pool cues, or turned the pool cues over to you, did you consider him a suspect at that time?

A. No, I did not.
Q. Did you, in fact, take those—the pool cues—
A. Yes.
Q. —to have them examined?
A. The pool cues were taken back to the NIS office and, in fact, the pool cues and the case were examined.
[121] Q. Did the accused consent to your taking the pool cues? Did he give you permission to?
A. Yes, he did.
TC: The government has no further questions.
MJ: Gentlemen, cross, please.
CC: Your Honor, before we question him, could I just ask one preliminary question.
MJ: Surely.
CC: Did you take notes of this interview on the 20th?
WITNESS: Yes, I did.
CC: May we have them, Your Honor? I hate to do this. It's going to take us a long time to go through this but we intend to do this with every witness. We've been saying this for months.
TC: The government has no objection, Your Honor.
MJ: Do you have your notes with you, Agent?
WITNESS: Your Honor, I'm afraid that they are back at the office.
MJ: Your office is right here in the same building.
WITNESS: Yes, it is.
MJ: Could I trouble you to, please, go and obtain those notes.
WITNESS: Yes, sir.
MJ: Would five minutes suffice?
WITNESS: Yes, Your Honor.
MJ: Five minutes, gentlemen.
CC: Thank you.
MJ: Thank you very much.

An Article 39(a) session was recessed at 1035, 15 March 1989.
An Article 39(a) session was called to order at 1100, 15 March 1989.
[122] MJ: The court will come to order.
TC: The record should reflect that all persons present when the court recessed are again present. The members are absent. Special Agent Clark remains on the witness stand and under oath.

CROSS-EXAMINATION

Questions by the defense:
Q. Agent Clark, if you would, please, tell us everything that you were aware of regarding OSSA Davis at the time you began the, what you described as an, interview on the 20th of October.
A. Everything that—I'll give it my best shot here. I knew that he was a regular patron of the club, EM Club. I knew or had reason to believe that he had his own pool cues. Just prior to talking with him, I had found out that he was UA the previous day, I believe, and that he was currently on restriction for that UA. I also knew that he had made a statement to the master-at-arms that was with him that he thought he knew who did the murder. So, I was looking at him as a witness.
A. Anything else?
A. Let's see. I also knew that—this came up just before talking with him on the 20th of October—his division officer and the Executive Officer of the Mahan told us that he had made a statement regarding wanting to shoot somebody and that they were going to have him sent over to the hospital for an evaluation due to that statement.
Q. Anything else you can think of?
A. Nothing that comes to mind at this time.

Q. Who was the case control agent on this particular investigation?

A. Special Agent Sentell.

Q. And what is your relationship to Special Agent Sentell?

A. She's a co-worker.

Q. I take it you were assisting in this investigation.

A. Yes.

Q. How closely were you and she exchanging information?

A. We tried to keep up on a daily basis.

Q. So information that she knew you would have known?

A. In all probability, yes.

[123] Q. And as of the 20th of October of 1988, NIS had already begun to narrow the investigation to believe that Seaman Shackleton was killed with a pool stick, had you not?

A. Yes, we had.

Q. You had already talked with Dr. Conradi, one of the medical examiners for Charleston County regarding the pool stick?

A. Yes, she was talked to by an agent.

Q. NIS had talked with her on approximately the 17th of October, had they not?

A. I believe that would be correct.

Q. And you were aware of that on the 20th of October?

A. Yes.

Q. And you were aware of the information that NIS was looking for pool sticks?

A. Yes.

Q. NIS had also spoken with Ms. Judy Flynn who was the forensic chemist for the Charleston City Police Department regarding pool cues, had you not?

A. Prior to the 20th, I don't know if we'd talked to her regarding pool sticks or not.

Q. NIS had also gone out to a local pool hall called "Tuckers" several days before that, correct?

A. I know that that trip was made. I don't know the exact date.

Q. And prior to talking to Seaman Davis on the 20th of October, you and Special Agent Sentell had also talked to an OS3 Guidry?

A. Yes.

Q. Petty Officer Guidry had told you that in a conversation with Seaman Davis regarding the incident over at the—over behind the commissary, Seaman Davis had indicated to him, him being Guidry, that Davis had heard something about the death, correct?

A. That's correct.

Q. Guidry had made the comment something regarding the guy falling over by the commissary?

A. I don't recall him using the term "falling."

Q. But what was the substance of the information that Guidry provided you as to what Seaman Davis had said?

A. I talked to Guidry and I also—

[124] Q. Didn't Seaman—Didn't Petty Officer Guidry tell you that Seaman Davis said that the guy was killed with a pool stick?

A. Yes. Okay, that was Guidry and not Smith. Smith was a master-at-arms that was sitting with Davis also.

Q. But prior to talking to Seaman Davis, you had talked to Petty Officer Guidry who had told you that Davis had said to him that the individual was killed with a pool stick.

A. I'm sorry my mem—I'm trying to recall the conversation without refreshing my memory by notes, and I believe he did relate to the—that the guy had been killed by a pool stick.

Q. Okay, you as an agent of the Naval Investigative Service were aware of that prior to talking to Seaman Davis, correct?

A. That's correct.

Q. You were also aware of information from Petty Officer Smith that Seaman Davis might have some information for you, correct?

A. That's correct.

Q. All this time NIS is looking a pool stick as the probable murder weapon, correct?

A. That's correct.

Q. Do you remember OS3 Guidry telling you that Seaman Davis had told him that Davis had been hit and jabbed with a pool stick?

A. Excuse me, that the victim, Shackleton, had been hit and jabbed and with a pool stick?

Q. Right.

A. That that was the information that he had heard. In other words, Guidry saying that Davis told him that he had—that Davis had heard that from a fourth source.

Q. Guidry told you, "Davis told me the guy was hit and jabbed with a pool stick," correct?

A. He said that—yes, he said that.

Q. So you're aware of Seaman Davis having what one of your agents has described as intimate information regarding the manner of death, correct?

A. That would be correct.

Q. Now, at the time, on the 20th of October, that you were investigating Seaman Davis, had the Naval Investigative Service promulgated any information regarding the manner of death or were y'all holding that close to your vest?

A. Had we released any of that information to anybody or had we just the knowledge?

[125] Q. Special Agent Clark, at the—on the 20th of October, NIS was keeping the information that y'all knew or that you believed regarding the manner of death to yourself, weren't you?

A. Yes.

Q. It was not public information.

A. No, it was not.

Q. So someone knew, then that individual had some type of inside information.

A. Yes.

Q. And you were aware that Seaman Davis had that type of inside information.

A. At the time it was general information. We had already collected a couple of pool sticks.

Q. But was it general information or was it inside information? You just told us that y'all were holding that, that you were not disclosing that.

A. Some of it was kept and not released, the specific injuries.

Q. You also knew prior to talking to Seaman Davis that he owned at least one pool stick that could be broken down, that could be unscrewed, correct?

A. That's correct.

Q. You also knew or your believed that the victim, Seaman Shackleton, had been at the Enlisted Club on the evening of the 2nd of October, morning of the 3rd of October, correct?

A. That's correct.

Q. You also had information that Seaman Davis was at the Enlisted Club that night, correct?

A. Yes, that's correct.

Q. You were also aware that on the morning of the 3rd of October, Seaman Davis had been an unauthorized absentee for a portion of the morning.

A. That's correct.

Q. And you were aware that on the 20th of October, he had been an unauthorized absentee.

A. That's correct.

[126] Q. And you were aware, from Petty Officer Smith, that Seaman Davis had made a statement to him, meaning Petty Officer Smith, that Davis knew who committed the murder.

A. That's correct.

Q. You also know the Executive Officer, the Division Officer, the Chief Master-at-arms and other individuals on the Mahan were aware of a statement that Davis had made to the Division Officer regarding wanting to kill someone.

A. That's right.

Q. And that was, in fact, the reason that y'all were over on the Mahan that day, isn't it?

A. No, it is not.

Q. How many people had told you that Seaman Davis owned some breakdown pool sticks?

A. That would be hard for me to say. It would be several people.

Q. Do you have any notes that would refresh your memory?

A. There would be various interviews of people that were patrons at the club.

Q. Four? Five? Ten?

A. I'd say four or five.

DC: Just a moment, sir.

MJ: Surely.

[Defense counsel reviewed his notes.]

Q. Special Agent Clark, what information did you know on the 20th of October regarding Seaman Davis allegedly slushing funds on the Mahan?

A. I didn't have any knowledge of that until after we started talking with Davis.

Q. How did you get that knowledge?

A. It was volunteered by Davis.

Q. Did you warn him at that point of illegal—of his Article 31 rights about not discussing matters involving illegal loan operations?

A. I did not. He volunteered the information, and I didn't ask follow up questions on the slushing.

Q. So in one fell swoop Seaman Davis would have blurted out that he gets his money from playing pool, that he makes about $900.00 a payday from slushing, collecting from the ussery loans, that he owes OS2 Mull [127] money from slushing because people who do not want to borrow from Mull will borrow from him and he gets the money from Mull. That's all—

A. I asked him if he owed anybody money or if anybody owed him money.

Q. So, then you were asking him questions concerning that without having warned him?

A. I was asking him questions—

Q. Yes or no?

A. I was asking him questions whether or not he owed anybody money.

DC: Just a moment, sir.

MJ: Certainly.

[Defense counsel revicwed his notes.]

Q. Now during the interview, as you have classified this, on the 20th of October, Seaman Davis provided you and Special Agent Sentell specific facts concerning the alleged murder that occurred on the 3rd of October, didn't he?

A. I believe the facts that he provided us on the 20th were quite vague as far as what happened or how the victim actually was killed.

MJ: I didn't hear that. I'm sorry, Agent.

WITNESS: I said I believe the information that Davis provided to us on the 20th was vague information regarding how the victim was killed.

MJ: Thank you. Please, proceed, sir.

DC: Thank you, sir.

Q. Would you regard a description of the victim as having been "hit and jabbed" as vague information?

A. When it is being reported that this was information from a third source.

Q. When it's an individual who has, according to your own testimony, made statements to at least two different people knowing about the method of death and then tells you that he was hit and that he was jabbed, that's still vague information or is it intimate knowledge?

A. I am not sure at the time on the 20th if I knew that the victim was specifically jabbed or all the specifics of the autopsy and the medical results. It would be pertinent knowledge, this knowledge that would only be known by the perpetrator.

[128] Q. The case control agent in this case was Special Agent Sentell?

A. That's correct.

Q. And Agent Sentell is the individual in charge of the entire investigation. She was in the room with you on the day that you were interrogating Seaman Davis on the 20th of October?

A. Yes, she was.

Q. And at no time on the 20th of October did you provide Seaman Davis any advisement of his Article 31 rights, did you?

A. We did not.

Q. And after this approximately 30 to 40 minute interrogation, where he had provided you information about the individual, the victim, having been hit and having been

jabbed, indicating jab and hit in the left temporal area of the head, you then asked for Seaman Davis' pool cue.

A. We asked for his pool cue.

Q. Did you ever use—at that point, did you use a permissive authorization for search and seizure form?

A. No, it was—I believe this was purely voluntary allowing us to look at his pool cues. It was not a search.

Q. So you never—

A. It was not a seizure.

Q. You never told him that he was suspected of having in his possession what NIS believed to be a possible murder weapon?

A. No, we did not.

Q. Now, you'd said earlier that he was free to go, free to come. He just kind of volunteered to go up there. Isn't it true that he had been directed by the master-at-arms to be outside the Commodore's stateroom?

A. He was on restriction, and he was probably directed there.

Q. FC2 Smith was the duty master-at-arms that day, wasn't he?

A. Yes.

Q. And FC2 Smith is the one who opened the door and said, here's Davis, he has something to tell you.

A. He opened the door for Davis to come in. I don't recall what he said at the time.

Q. But Smith, the master-at-arms, is standing there with Davis?

A. Yes.

[129] Q. So, Davis wasn't just volunteering to come in? He'd been directed by the law enforcement personnel of that command to be there to talk to you.

A. He was directed to be there. He was not—mandatory to stay. The master-at-arms was not in the room with us.

DC: Just a moment, sir.

MJ: Surely.

[Defense counsel reviewed his documents.]

Q. Agent Clark, what is your position in this investigation in term of the hierarchy of Agents that are working on it, where do you fit in?

A. I am a supporting agent in the investigation and have done, probably, the second most amount of work in the investigation, other than the case agent.

Q. So, if there were any agents around who would know more the case than any of the others, it would be you and Special Agent Sentell.

A. That's correct.

Q. Now I assume that the various agents working on this case had been sharing information.

A. Yes.

Q. And that y'all were aware of what each other were doing?

A. Yes.

Q. What information did you have regarding an interview with Seaman Davis at the Enlisted Club on the 14th of October?

A. I was unaware that he had—his name had come up before or that he was interviewed prior to that.

Q. Did you ever discuss this case with Agent C. R. Baldwin?

A. Yes. In fact, I went to the Club with Special Agent Baldwin several times.

Q. Did you go on the 14th of October?

A. I really don't recall if I was there on the 14th of Ocober or not.

Q. Do you have notes of that trip to the Club?

A. I'm not sure if I was taking notes on the 14th, if I was there, or if Baldwin was there on the 14th, if he was the one that was taking the notes.

[130] DC: We'd like to see those notes if we could, sir.

MJ: Whose notes?

DC: The notes of the trip to the Club on the 14th of October, sir.

MJ: I thought he went and got his notes.

DC: Sir, those were notes of simply an interview which occurred on the 20th of October. What we're looking at, sir, is the information that the government had as of the 14th of October when they interviewed Seaman Davis.

MJ: I thought he said he didn't interview Seaman Davis on the 14th. How would he have notes of an interview he didn't participate in.

DC: Special Agent Baldwin has information in here. Special Agent Clark has indicated that he and Baldwin were both at the Club on the 14th of October, that he doesn't remember for sure whether or not Baldwin were making the notes. Sir, the situation is that the government is in control of the information which the government knew as of the 20th. What we're trying to do, and what we've been trying to do all along, is discover what information the government had at the time. We believe that this is relevant and discoverable.

MJ: How about the notes of the 14th, Captain Thompson?

TC: The government's not sure the witness said that he was even in the Club on the 14th of—

MJ: Answer my question. What about the notes of the 14th, if they were taken by Mr. Clark, by Mr. Baldwin, by any of the other agents, by anyone, concerning the visit to the EM Club, are there any notes in existence, please?

TC: I don't know, Your Honor.

MJ: Can we find out?

TC: We can—I'd be willing to have the witness check.

MJ: Do you need those notes to conduct your examination?

DC: Yes, sir, I'd like to see them.

MJ: Before you proceed any further?

DC: Yes, sir.

MJ: Very well, let's do that. We will recess until recalled by the military judge. Thank you.

The Article 39(a) session recessed at 1127, 15 March 1989.

The Article 39(a) session was called to order at 1204, 15 March 1989.

MJ: The court will come to order.

TC: The record should reflect that all persons present when the court recessed are again present. The members are absent. Special Agent Clark remains on the witness stand.

MJ: Are you ready to proceed?

DC: Yes, sir.

MJ: Surely, at your pleasure.

CROSS-EXAMINATION (continued)

Q. Agent Clark, before the recess, we were discussing notes of interviews that were done on the 14th of October at the Enlisted Club. Were you able to track down those notes?

A. No, sir. I looked through all the notes that I have, and I have no notes of interviews of Davis on the 14th.

Q. Do you have any notes of interviews with Davis on any other date?

A. Not any other date prior to the 20th. I did not look for any dates of interviews with Davis after the 20th.

Q. How about describe the room, describe the stateroom, where you were located.

A. The stateroom that we were located was large in comparison to other staterooms, had a round table as you entered the room just to the left of the door with an "L"-shaped couch and some moveable chairs on the other side of the table.

Q. All right, as you entered the—you go through the door, the round table is to your left. What's to your right?

A. To your right is another doorway, you go in, and there's a bathroom.

Q. Small—there's a rack and then around into a head?

A. Yes.

Q. Was there also a desk in that outer room?

A. Yes, there is a desk there.

[132] Q. And there was a duty master-at-arms stationed outside the door to that compartment?

A. I believe he did stay outside the door.

Q. And two NIS agents in the compartment at the time you interrogated Seaman Davis.

A. We were interviewing him, and, yes, there were two agents in the room.

DC: Just a moment, sir.

MJ: Surely.

[Defense counsel conferred.]

Q. Agent Clark, at any time during this investigation, after the 14th of October, did NIS generate a document showing the results of the interview with Seaman Davis at the Enlisted Club that night?

A. Yes, there was a note on a listing of interviews conducted. It was broke down by each individual agent, and that was reflected that Special Agent Baldwin on the 14th had Davis' name down, had talked to him.

Q. Was there anything any more detailed than that?

A. If there is anything more detailed then Special Agent Baldwin would have any notes on it. I'm not aware

of any results of interviews that were conducted or that were written on any interviews on the 14th.

Q. In a document that—I can't find the date on it, but in a document indicating interviews that you had conducted, it indicates that on the 4th of October, you had spoken with a Michelle Renee Lippert, and that she had overheard some rumors. You also had spoken with a Debby K. Clark, both of these individuals from the enlisted galley indicating they had overheard rumors. What rumors had they overheard?

A. They had overheard rumors about the victim being found behind the commissary, and the specific rumor that came back from that—I believe I conducted a couple interviews on that. One was a dental technician that originally reported that he thought he had some information regarding this. As I traced it back, it was just coming from information that was overheard from a police—base police radio.

Q. What was the substance of that rumor?

A. I would have to refresh my memory from notes on the exact substance of the rumor. I do recall that after talking with several people that it was determined that this was not any pertinent information that was derived from anything—knowledge of the actuai scene.

[133] Q. So you would have spoken with Lippert, Clark and also Daniel Arthur LaSalle from the dental clinic.

A. Right. LaSaile, I believe I spoke with first.

Q. Are there reports? Are there any type of formulation of the information from those interviews?

A. It was considered a negative interview in that the information derived from that did not assist in any way of narrowing down any suspects. I believe that I made a results of interview on that information. I would really

have to go back and research the file to see if, in fact, I did make that.

Q. But, at this point, you can't recall the substance of the rumor, but with the assistance of your files, you could.

A. Yes, I would be able to. The substance of the rumor was first given me was that someone had heard early on that someone was killed behind the commissary. I think the substance of the rumor was only that someone had died, and that was, maybe, before a lot of rumor had gotten out. So, I was interested in knowing who knew that early. I traced it back. It was overheard from a police broadcast on the radio.

Q. But the fact that someone had died behind the commissary was generally common knowledge. It had been published in the newspaper.

A. The newspaper hadn't had it out at that time. That was—I don't believe. That was the 3rd.

Q. So, as of Tuesday the 4th of October, it's your opinion or your testimony that general information about the death behind the commissary was not known around the base?

A. Oh, it was known at that time, but it wasn't known at the time that the information was reported to have been transpired that was—the information was reported to me on the 4th but came to LaSalle on the 3rd.

Q. What's the information? That's what we're driving at.

A. To the best of my knowledge, the information was only that someone had been killed behind the commissary.

DC: We don't have anything further at this time, sir.

MJ: Captain.

[134] **REDIRECT EXAMINATION**

Questions by the prosecution:

Q. Just for the record, Special Agent Clark, there was reference made to notes of an interview of the accused on the 20th of October 1988, did you provide those—had you provided those notes to the defense?

A. The notes on the interview of the 20th of October had been provided today to the defense.

Q. Some reference was made to statements the accused made to a Petty Officer Guidry, an OS3 Guidry, do you remember exactly when you found out what information Guidry had concerning the accused?

A. Guidry was fully interviewed after we had talked to Davis, and we did talk to Guidry prior to Davis on the 20th, and, at that time, he told myself and Special Agent Sentell about Davis relating that someone had told him that the victim was beaten and jabbed with a pool stick. The information, however, when Guidry was describing being jabbed was not in the correct area of body that the victim was, in fact, injured.

Q. What was your impression of what—of the information? Was it that it was a rumor or—?

A. My impression of the information was that it was common knowledge at this point that we were interested in pool sticks and that a rumor mill had already started that we were looking at the victim being injured by a pool stick and that this was just another spinoff of people's imagination of the injuries that the victim may have sustained.

Q. Had you heard various rumors during the course of the investigation?

A. Yes, we had.

Q. Did you—now you talked about being aware that the XO and, apparently, the Division Officer had knowledge that Davis had made a statement at some point that he had wanted to shoot someone.

A. Yes.

Q. Did you or Special Agent Sentell attach any significance to that statement in conjunction with your interview of the accused?

A. The only substance that I—

DC: Sir, object to the comment as to any importance that Special Agent Sentell would have attached to that. I don't believe that he's competent to testify regarding that.

MJ: He already indicated that they were exchanging information. So I will allow it. You may proceed, sir.

[135] WITNESS: The only substance that I put to that information was that possibly the individual we were to interview, Davis, was prone to making statements of that nature. I had no information that he, in fact, intended to carry any of that out, and that we were not looking at a victim of a shooting. I did not consider that that was necessarily pertinent to this investigation.

Q. There's also evidence that the accused had been on some sort of a short UA period and, as a result, was being placed on restriction. Did you question him about this unauthorized absence?

A. Yes, we did, and he, to the best of my memory, stated that he had overslept at a girlfriend's house.

Q. What, if any, threats did you make to the accused?

A. Never threatened the accused.

Q. Are you aware the master-at-arms aboard the Mahan making any sort of threats to him?

A. I'm not aware of any threats having been made to any member of the Navy.

Q. Was there any sort of subtle actions that could have been construed as threatening by the accused? Showing handcuffs, that sort of thing.

A. No. My weapon and my handcuffs remained covered underneath my jacket. I kept a cordial atmosphere. It wasn't ever an adversarial-type situation during the interview, and I made it a point that he knew who I was, and so

did Special Agent Sentell. We both showed our credentials when we introduced ourselves and were very open about what we had to talk with him about.

Q. With regard to the pool cue sticks, you said that the accused surrendered them to you. Did you say anything about a search warrant? Did you threaten to get a search warrant if he didn't turn them over? Anything like that?

A. No, I did not. At the time, we did not have enough probable cause to obtain a search warrant for any pool sticks.

Q. Did you mention anything about a search warrant to Seaman Apprentice Davis?

A. To the best of my memory, I did not ever say anything to him about getting a search warrant.

TC: The government has no further questions.

MJ: Counselor.

DC: No, thank you, sir.

EXAMINATION BY THE COURT

Questions by the military judge:

Q. Prior to, and including, the 20 October interview, how many witnesses had you and your colleagues interviewed or approached? I don't need a precise number, but could you give me a fairly good ballpark figure, sir.

A. The best ballpark figure that I can give is that I know initially we had approximately six agents, six to eight agents, working on this at a time, and, in the period of time between the 3rd and the 20th of October, collectively, NIS agents out of this office had talked to maybe a hundred to two hundred and fifty people.

Q. You indicated that there had been some individuals that had been playing pool at the EM Club were frequent participants at the EM Club and owned their own pool cues. How many of such individuals were you aware of at the time?

A. I was aware of approximately four individuals we knew had their own pool cues.

Q. I believe you indicated that y'all drove out to MENRIV to the quarters and Seaman Davis got out and went to a red Fierro.

A. Yes.

Q. How did he get in? Was it unlocked?

A. It was an unlocked vehicle.

Q. What time of day was this, please, Agent?

A. This was in bright sunlight. I don't recall when we did the interview.

Q. Was it morning? Afternoon?

A. It was either just before lunch or during the noon hour.

Q. Whose car was that? Did you ever determine that?

A. That was the government vehicle that—

Q. No, no, I mean the car that he went into.

A. Oh, yes, sir.

Q. I'm sorry.

A. The car that he went into, in fact, belonged to Albertha Heffner who he had been seeing socially.

[137] Q. So there was an unlocked car that contained what I believe you described as valuable cue sticks.

A. Yes.

Q. Did you go into the quarters at all, or did you leave?

A. When you got to the residence, Special Agent Sentell was first going toward the front door to get the owner of the car and have her go in the car. Davis went to the car and opened the car door as I was saying, "Maybe we should wait and get the owner of the car out here to get into her car," and he went ahead and opened the car door and got his sticks out.

Q. You had indicated that you were aware that the accused may have had some information regarding the

nature of circumstances of the death of Shackleton and, again, bear with me. [Reviewing his notes.] That he had heard from some other person about those circumstances. is that fairly accurate?

A. Yes, that sounds fairly accurate. If I could, maybe, clarify?

Q. Let me just ask: it was my understanding from your testimony that you were under the impression that whatever information he had, he had obtained some third source, some other source.

A. That's correct.

Q. Did he ever tell you that source during the 20 October interview?

A. I believe he—yes, he told us that he had heard about the victim being killed and this was from, I believe, a Bonnie Krusen and a Kaiser.

Q. Oh, I'm sorry. Bonnie?

A. Bonnie Krusen.

Q. And other individual?

A. Last name Kaiser.

Q. At that time, were these people known to you? Did you have knowledge of their existence and their possible contact with this case?

A. They both had been interviewed.

Q. So, they were not strangers to you or to Agent Sentell?

A. No, they were not.

Q. Let me ask you this: at the time of the interview, did he give you information that tracked with what your investigation had revealed or was it off the mark?

A. The information that he gave was not specific about the way the victim died. In fact, he was very certain that he had only heard about it through conversations with other people.

[138] Q. In other words, during the 20 October interview, he told you that his information had been derived by identified individuals?

A. Yes.

Q. You indicated you had already collected some cue sticks.

A. Yes, sir.

Q. From whom did you collect them?

A. A pool stick was collected from Kaiser by Special Agent Sentell. I was not present during that collection.

Q. You used the plural.

A. I believe—I don't know of another pool stick that was collected prior to that date. There were other pool sticks collected during the investigation.

Q. It would seem to me from your testimony that the pool cue had become the most likely means of infliction of the mortal wound.

A. Yes.

Q. Why? The pool cue is not that unusual in shape. Why a pool cue as opposed to, let's say, a baseball bat or a fungo bat or a softball bat?

A. A pool cue, due to its circumference, as a baseball bat or a softball bat, would be large.

Q. In other words, you had specific evidence which indicated that an instrument such as a pool cue was the most likely cause of the injury?

A. Yes, this, again, was derived through agents interviews of medical personnel and information which was just brought back to me. So I had a general knowledge of it.

Q. So pool cues were of particular interest to you as opposed to some other blunt instrument?

A. That's correct.

MJ: I have no other questions, Agent. Thank you very much. Any questions based upon the inquiry of the military judge, please?

DC: Yes, sir.

MJ: Please.

DC: Just a moment, sir,

[Defense counsel conferred.]

MJ: Let me ask you one more question.

[139] **EXAMINATION BY THE COURT (continued)**

Q. Kaiser, is Kaiser a member of the naval service? Is he uniformed?

A. Yes, he is, sir. I believe his first name is Jeff.

MJ: Very well, thank you, sir.

RECROSS-EXAMINATION

Questions by the defense:

Q. Agent Clark, your notes indicate that you were interested in the clothing that Seaman Davis was wearing on the night of the 3rd of October. What was your curiosity regarding that?

A. Very often while conducting witness interviews, people will remember what certain individuals were wearing and be able to describe that but not know their name. We tried to identify everyone that was at the club by what they were wearing so that we could also identify them through other interviews.

Q. According to this you've got Davis wearing jeans with six pockets and a light blue shirt. Back off of that. The issue we're looking at is whether or not Seaman Davis was suspect, should have been a suspect, on the 20th. Are you aware of the concerns that the command had that Seaman Davis was a possible suspect in this homicide?

A. Yes, we tried to alleviate the command's concerns at that point.

Q. So you are aware that the command thought he was a suspect?

A. I cannot control what command thinks.

Q. So, someone else had told you that this guy is a suspect?

A. They don't make that determination.

Q. But someone had told you this man is a suspect, we want you to talk to him?

A. No, I don't believe that ever came out like that.

DC: No further questions at this point, sir.

MJ: Captain.

TC: Yes, sir.

[140] **REDIRECT EXAMINATION**

Questions by the prosecution:

Q. Special Agent Sentell [sic], you testified that when you interviewed Davis on the 20th of October, he told you that he had learned information concerning this death from other individuals, correct?

A. Yes.

Q. He mentioned Bonnie Krusen specifically for example or a Krusen?

A. That's correct.

Q. As a result of what Seaman Davis told you, did it cause you to more closely scrutinize the activities of the persons he told you about?

A. That was a thought that needed verification before I could do—before I could really consider him suspect.

Q. Did you look into what he had told you?

A. Yes. In fact, Special Agent Sentell and myself went over to the—I believe it was a Howard Johnson's and tried to track down exactly what Bonnie Krusen's activities were

and who she was with and what room was rented and spent a good day investigating that lead.

Q. Did you collect a pool cue from Bonnie Krusen?

A. I believe there was a pool cue collected from Bonnie Krusen.

MJ: I didn't hear what—What did you collect from her? I apologize, sir.

WITNESS: I believe I did—I believe there was a pool cue collected from Bonnie Krusen.

MJ: Thank you.

Q. When you went aboard the Mahan on the 20th to talk to Seaman Davis, did you advise the command of why you were there?

A. Yes, I did.

Q. What did you advise them in that regard?

A. They had the prior knowledge that we wanted to talk with Davis because contact had been made on the previous day that Davis was UA and that we wanted to talk with him. So command knew that we were wanting to interview Davis and that, by the way, was prior to any statements Davis made of wanting to shoot anybody or anything of that sort.

[141] Q. What did you tell—Did you tell the command why you wanted to interview him? Did you say—did you tell them he was a suspect in a murder case? What did you tell them?

A. No, we—command was told that Davis was going to be interviewed as a witness and, in fact, was very deliberately told that he was not suspect in the investigation but we just needed to talk to him as a possible witness.

TC: The government has no further questions.

MJ: Anything further, Mr. Yandle?

CROSS-EXAMINATION

Questions by the defense:

Q. The absence you're discussing was an absence on the 3rd of October, correct?

A. No, I was discussing the UA the day prior to being—Davis being interviewed on the 20th.

Q. Are you sure that the absence was not the 20th?

A. The morning of the 20th?

Q. Uh-huh.

A. I believe he was absent prior to that on the 19th and came in on the 20th. But he was absent that morning also.

DC: Just a moment, sir.

MJ: Sure.

[Defense counsel conferred.]

Q. Agent Clark, on the 20th you'd indicated that you've talked to Petty Officer Guidry. Do you have any notes of that conversation?

A. Yes, I did make notes of Guidry's conversation.

DC: Sir, we'd like to see those notes also. This indicates—this is an investigative action report indicating that OS3 David Lloyd Guidry, USN, 437-17-3736, advised that prior to 6 October of '88, subject told him that victim was killed when he was hit and jabbed with a pool stick. Sir, the issue is the extent of knowledge that the Naval Investigative Service had at the time that they first spoke with Seaman Davis. I believe that it's relevant to the inquiry.

MJ: Do you have those notes, Special Agent?

WITNESS: I believe I do, Your Honor.

[142] MJ: Let me leave it at this: the agent, I am sure, will make the notes available to you. If you feel as though they warrant further examination of the agent, you, certainly, will be free to call him and to cross-examine him in that regard. Fair enough?

DC: Yes, sir.

MJ: Do you have the notes here?

WITNESS: Yes, sir.

MJ: Oh, I'm sorry. I apologize. Why don't you display them to counsel, Special Agent.

[The witness did as directed.]

WITNESS: These are the actual notes taken from the interview of Guidry.

Q. Agent Clark, when were these notes made?

A. These notes were made on 20 October just prior to—during the time I was talking with Guidry.

Q. What are the notes that you're now referring to? I mean, what do you have in your hand that you keep looking at?

A. I made a copy prior to coming over of my original.

Q. So, I have the original, you have the copy?

A. Yes.

Q. Now, these notes were made when?

A. On the 20th of October.

Q. During the time that you spoke with Guidry?

A. Either during the time that I spoke him or shortly thereafter, one. I believe this was made actually during the time I was speaking with him.

Q. Any changes to this? Did you go back and change this at any time between the 20th of October and today?

A. Not to my knowledge.

DC: Let me show you the original so you can take a look at that and see if there have been any changes, any modifications.

Q. Based on your review of that, do you notice any changes?

A. There is a change here that was made during the interview where I changed a "was have" to a "could have," and that's the way that I [143] understood it the first time. It was clarified that he said that "could have" instead of

"was," and also a spelling, I think, on Louisiana. There was some cross over there.

Q. But other than that?

A. Excuse me, I gave you my copy too.

Q. Other than that, the document that we have today is the document that was drafted with some minor corrections on 20 October?

A. That's correct.

Q. And I believe in your notes it indicates that Davis said the victim was beat—was beat up and jabbed with something that could have been a pool stick. Is that accurate?

A. That's correct.

Q. So, it doesn't say anything in here about Davis telling Guidry that somebody else told him that. This is simply Davis telling Guidry that the guy could have been killed and beat up or beat up and jabbed with a pool stick. So, you were aware that Davis had made, at least, an admission to Guidry that he knew how the man had been killed, that he'd been beaten up and jabbed with something that could have been a pool stick and you knew that prior to talking to Davis, didn't you?

A. Yes, I knew the information that's contained in my notes, and that he stated that he'd been beaten and jabbed with a pool stick.

Q. And yet with that information, with the knowledge that he was absent from his command the morning of the alleged murder, with the knowledge that Seaman Davis had been in the Club on the night of the alleged murder, with the knowledge that he had pool sticks, and the knowledge that he had made this statement to Davis [sic], you didn't suspect him of any misconduct?

A. At that point, I could not determine what weight to put on the statement that he had made to Guidry.

Q. You'd indicated some problem or indicated that Guidry couldn't tell you exactly where the guy had been hit.

A. That's correct.

Q. But when you were talking to Seaman Davis, Seaman Davis told you where the guy had been hit, didn't he? Told you he'd been hit and he'd been jabbed on the left side of the temple, didn't he?

A. He didn't tell me that on the 20th.

Q. Are you certain of that?

A. I'm pretty certain of that.

Q. Did he tell Special Agent Sentell that?

A. Not on the 20th.

[144] Q. If Special Agent Sentell would have said hit—that Shackleton—let me back up one question:

Q. Agent Sentell, if you would, would you elaborate on the statement "provided information during interview regarding injuries sustained by Keith Shackleton which were not publicized outside of law enforcement officials." With some specificity, what were the things he revealed?

A. "Hit and jabbed."

Q. I'm sorry?

A. "Hit"—that Shackleton was "hit and jabbed." He was hit on the back of the head. In this temporal area, he received a jab. Nobody outside the medical autopsy, Dr. Conradi or the people that were very closely working with this investigation knew that he had been "hit and jabbed."

IO: Let the record reflect that the witness has pointed to her left temporal area with her . . . hand.

Q. Would Seaman Apprentice Davis have told Special Agent Sentell that on the 20th?

A. I have no notes of that specific information being reported by Davis on the 20th. I did not have that in my notes.

DC: No further questions at this time, sir.

MJ: Anything further, Captain?

TC: Yes, sir.

WITNESS: Yes.

REDIRECT EXAMINATION

Questions by the prosecution:

Q. It is possible that the information that defense counsel was referring to was information provided by Petty Officer Guidry in a statement on the 4th of November?

A. It certainly sounds more closely related to that statement.

Q. Do you remember the accused saying anything remotely resembling that during your discussions with him on the 20th of October?

A. No. I recall nothing close to that.

[145] Q. Do you think that's significant enough where you would have made a note of that?

A. I certainly do.

Q. To the best of your knowledge, prior to your interview of Seaman Apprentice Davis on the 20th of October, was there anything did you can recall that would have led you to believe that Davis was in the receipt of anything more than knowledge gleaned from a rumor or from another person?

A. No, there was not.

Q. Was there anything that occurred during the interview that would have led you to believe anything different?

A. No, there was not.

TC: The government has no further questions.

EXAMINATION BY THE COURT

Questions by the military judge:

Q. Agent, you indicated that on the 20th, you did not suspect the accused in the sense of Article 31. When did he become a suspect?

A. Robert Davis became a suspect once we had information that he had, in fact, made a statement that he had killed the victim.

Q. Who was that statement made to?

A. That was a statement derived from Mull.

Q. Which was, apparently, on the 27th or so?

A. I believe that's correct.

Q. Now, Mull testified that it was common knowledge on the ship by the 27th that the accused was a suspect and that, of course, y'all were actively pursuing the case. What did he base that on? Obviously, you can't get inside his head but it appeared from his testimony that was sort of the common understanding on board Mahan that Davis was a focus of the investigation.

A. Yes, I had heard that, in fact, Davis had been considered by others to be a suspect, also that Bonnie Krusen had been considered a suspect. Jeff Kaiser had been considered a suspect. Practically everybody that we talked to for any length of time, we got word back that someone had—looking at them as a suspect.

Q. I'm more concerned about the official Mahan rather than the unofficial Mahan position. What was the official Mahan position? You [146] may sort of alluded to the fact that certain members of it's ship's company believed that he was, in fact, a suspect.

A. Yes, I do think that that was a common belief. I could not be surprised that the Executive Officer held that belief, however, when we first talked with him about interviewing Davis, tried to make it clear that we were doing

an interview as a witness, as we did all other witnesses, tried to make it clear that we were not suspecting them, and I think due to other problems that Davis had with the command and the statement that he had made earlier, that led them to believe that.

Q. Was this about the shooting?

A. Yes.

Q. Who was the "someone" that he was going to shoot? Did you—

A. The only specific on that was talking to his Division Officer, Davis' Division Officer, said that he felt he would shoot a cop because he knew they shoot back. So, it was just any police officer.

Q. So, it was no specific identifiable person, as far as you knew?

A. No. As far as I know, no.

MJ: Thank you, Agent. Any questions based upon the inquiry of the military judge?

TC: Not from the government, Your Honor.

MJ: Mr. Yandle.

RECROSS-EXAMINATION

Questions by the defense:

Q. Agent Clark, when did you first talk to Petty Officer Mull?

A. I may have talked to Petty Officer Mull prior to him giving a complete statement. I believe that that was around the 27th of October. I might be a little off on the date. I'm not sure.

Q. Could it have been the 1st of November?

A. It could have. It was the later part of October or the first of November. It could have been on the 1st.

Q. If I were to show a sworn statement that indicates the day of 1 November with Ronald Scott Mull's signa-

ture, your signature and Special Agent Sentell's signature, would it refresh your recollection as to the date?

A. Certainly.

[147] DC: If you would care to have me mark it as an Appellate Exhibit, I will.

MJ: No, I don't think that's necessary.

Q. So according to your testimony, it was not until y'all got that statement that you considered him a suspect?

A. To the best of my belief, that's correct.

Q. Do you know when Seaman Davis was admitted to the hospital?

A. He was admitted to the hospital shortly after we conducted an interview on the 20th.

Q. He was taken to the hospital on the 28th.

A. Okay, the following week.

Q. Aware at that time that individuals in the hospital as well as the command considered him a suspect?

A. I can—I would think that that would be entirely possible.

Q. Excuse me?

A. I would think that that would be entirely possible that others would consider him a prime suspect.

Q. Are you aware that the command, the USS Mahan, as early as 20 and 21 October were concerned about this individual's psychiatric well being?

A. Yes, I'm aware that on the 20th—

Q. And you are aware that they took action to have him evaluated because he was, in their mind, the prime suspect in this investigation?

A. I believe they had him evaluated because of statements he had made. I don't believe it had anything to do with this investigation.

Q. Is it a habit of the Naval Investigative Service to disregard the advice of an Executive Officer when he tells you that he has a suspect in an investigation?

A. We don't disregard what he says, but we have a much better handle of the entire scope of the investigation than any outside of our office.

Q. But certain individuals, including the Executive Officer of the Mahan, told you that this man was a suspect, and you didn't think it was important to try and rely or try and figure out why they might feel he's a suspect before you talk with him?

A. Well, they may have felt that he was a suspect, and we did talk with the Executive Officer before we did, and he did not have any information that would make Seaman Davis more of a suspect in the investigation.

[148] Q. But coupled with the rest of that information, you don't think it was reasonable to believe that he was suspect at that time?

A. We did not believe that he was a suspect at that time.

DC: Just a moment, sir.

[Defense counsel conferred.]

DC: Your Honor, if I may approach the witness.

MJ: You may, of course.

[Defense counsel continued to confer.]

Q. Agent Clark, when did y'all pick up Seaman Davis' service record?

A. That was some time after we interviewed him on the 20th of October.

Q. So, you picked it up on the 20th?

A. Was it on the 20th?

Q. I'm asking.

A. I don't believe so, no.

Q. When a squadron medical officer tried to review it on the 21st, it was not available. Would the Naval Investigative Service have had it at that point?

A. I don't believe so.

DC: Sir, may we have a short recess?

MJ: We're almost at 1300. Shall we take a luncheon recess? Would that be more appropriate?

DC: Sir, could we just have the witness step out. There is something we need direct with you that we prefer not to have done in the presence of the witness.

MJ: Very well, fine. If you would be kind enough to retire from the courtroom, Special Agent. Thank you. If you would just wait outside in the waiting area. Thank you, sir.

[The witness withdrew from the courtroom.]

CC: Your Honor, if it please the court. At a request made by the defense, the prosecution provides us what purports to be a medical record. We allege that this medical record is not complete. The reason we allege that is we have documents dated 21 October that are [149] not in this file, at least from our preliminary review. We would like the prosecution to make known to us if this is a complete medical record or it is not. We believe that there is more than one document that is of material importance to the defense of Mr. Davis that is missing from this file.

TC: The government hasn't seen that medical record. When it was delivered to the government, it was handed directly to the defense. So, as far as the government knows, it's a complete medical record.

CC: Your Honor, last week in a deposition, we were handed the medical—not a medical record but a material record in the examination of the forensic evidence that was changed by somebody in the government. There was a change in that record, a material change in that record, made from the time the discovery material was provided to us and it was retyped and it was in addition. We have a statement, and I proffer it to the court, that is dated 21 October '88; it's in his medical record we were provided a copy of, and it says "He is currently being investigated by

NIS as a suspect in a recent murder that occurred on base, although he denies involvement." Now, it also says "Service record not available of my review as NIS has it." Now, I allege that this document has been removed from the file. It's not in there. Now, maybe, we've made a mistake and reviewed the file and it may be in there. I cannot find it.

MJ: May I see that, counselor.

TC: The government's position is the defense is complaining about not getting something that's already in their possession.

CC: We are very grateful that it was given to us because it's material to the case, but it appears to be missing from the official record at this time.

[The military judge reviewed the document.]

MJ: Well, of course, the problem with this type of entry, we don't know what the author is relying upon. Is he relying upon some official representation by the command or is he just relating what the accused may have told him. So, I'm not denigrating your concern that, perhaps, it's not contained in the service record, but with regard to the contents, I think it's somewhat ambiguous.

CC: Well, he specifically says that NIS has the record. That wouldn't come from the accused.

* * * * *

[153] **TESTIMONY OF NIS AGENT SENTELL**

DIRECT EXAMINATION

Questions by the prosecution:

Q. Please, state your rank—or state your full name.
A. Jeanmarie Sentell.
Q. And how do you spell your last name?
A. S-E-N-T-E-L-L-.
Q. Ma'am, who is your employer?
A. I work for the Naval Investigative Service.

Q. And what are your duties with the Naval Investigative Service?

A. I'm a special agent, criminal investigations.

[154] Q. Do you know the accused in this case?

A. Yes, I do.

Q. If he's in the courtroom today, would you point to him and state his name.

A. [Doing as directed.] Robert Davis.

TC: The record should reflect that the witness has correctly identified the accused. Your witness.

MJ: Mr. Yandle, I will ask you to conduct your examination in a normal way. If you are unable to elicit information from the witness, I will let you modify your approach. Fair enough?

DC: Aye, aye, sir.

MJ: Very well, why don't you proceed, sir.

Questions by the defense:

Q. Ms. Sentell, what's your relationship to the investigation in the death of Seaman Apprentice Keith Shackleton?

A. I'm one of the case agents.

Q. And what's your particular relationship with this case?

A. I'm sorry, I don't understand the question.

Q. Are you the agent in charge of the case? Are you the case agent?

A. The case agent.

Q. You are the lead agent for the Naval Investigative Service then?

A. No, I am not.

Q. Who is the lead agent for the Investigative Service on this particular investigation?

A. Oh, I thought you meant for my office. Please, excuse me. For this investigation, I am the lead agent.

Q. And what do your responsibilities involve as the lead agent in this case?

A. To gather all the information and put it together. Interviews. Compilation of information. Submission of reports.

Q. And are you required to communicate with the other agents that are assisting you?

A. Yes.

[155] Q. Now, if you would, please, explain to the Judge what information you, as the lead agent in this case and other agents of the Naval Investigative Service, to your knowledge, were aware of regarding Seaman Davis' participation in the Shackleton murder, which is alleged, as of 20 October 1988.

A. Absolutely nothing.

Q. Absolutely nothing. Again, the full extent of your—

A. Knowledge?

Q. —information—

A. About Mr. Davis?

Q. —about Seaman Davis being involved with that.

A. We had no knowledge that he was involved in the investigation. He is a pool player. He was at the Enlisted Club. He is an enlisted club member or patron. That's all we knew.

Q. That's all you knew? Absolutely?

A. That's it.

Q. Before you talked to Seaman Davis on the 20th of October.

A. Except for the statements or not statements, but brief interviews that we had with Petty Officers Guidry and Smith, moments before we talked to Seaman Davis.

Q. What did Petty Officer Guidry tell you?

A. That he had a conversation with Davis in berthing some time before the 6th of October and that Davis had

told him that—had asked him about if he knew anything about the guy that got killed behind the commissary. and he said that—Guidry didn't know anything about it, and so Davis apparently, reportedly, told him that Shackleton had been hit and jabbed with a pool stick, had been killed by being hit and jabbed with a pool stick.

Q. So prior to talking to Seaman Davis, you did know something about his participation, allegedly.

A. His participation? No, I thought he just might have some knowledge for us as a witness.

Q. What had the Naval Investigative Service done, if anything, to narrow the scope of the investigation regarding a possible weapon?

A. There was a secondary conference with a local medical examiner by the name of Dr. Conradi to review the autopsy, the photographs, crime scene photographs and so on and such forth. After we conferred with her, based on the information that we had about Shackleton's last activities, which was he was in the Enlisted Club and that he was last sighted near the pool tables, she said, well, the injuries look to be consistent with a long tubular shock absorbing object or some—or words [156] to that effect. We explained to her that he had been play—the victim had been playing pool, and she said a pool cue, butt end of a pool cue stick could have been used.

Q. So, would it then be—what was the date that you talked with Dr. Conradi?

A. 17 October.

Q. So prior to talking to Seaman Davis on the 20th, you did know that you were looking for pool sticks?

A. Possibly pool sticks.

Q. Did you know anything about whether Seaman Davis owned a pool stick?

A. Yes.

Q. So, you did know a little bit more than nothing about Davis, didn't you?

A. I told you that he was a pool player and went to the EM Club.

Q. Dr. Conradi told you that it was a cue stick or that it was—the murder weapon could have been a cue stick?

A. Could have been, yes.

Q. What information, if any, did the Naval Investigative Service glean from conversation with the proprietor of an establishment known as "Tucker's Pool Hall"?

A. Oh, Tucker's, I talked to the owner there, and I asked him a little bit about pool sticks, 'cause I know nothing. He informed me that they were made of oak which is a very hard wood. He said—I asked him if he'd ever seen pool sticks that had been used as weapons in barroom fights or pool hall fights or anything along this line, and he said that, yes, he had seen quite few in his lifetime.

Q. So, would it be accurate to indicate that—well, what was the date that you spoke with the people out at Tucker's?

A. I believe it was the 18th of October.

Q. So, on the 17th and 18th, would it be accurate to say that you were narrowing the focus of your investigation to individuals with pool sticks?

A. We could probably say that, yes.

Q. What else did Mr. Tucker tell you about pool sticks?

A. Oh, I asked if they could be broken, and he said, yes, but he's usually only seen them broken or dented when they've been hit up against the side of a pool table or a cement object. After a fight that he's looked at pool sticks and they haven't even been dented when they've been used against somebody's body.

[157] Q. What about did he make any indication about the rubber bumper on the end of a pool stick?

A. I don't believe I asked him that question.
Q. Did he make any comment regarding it?
A. No, not that I recall. No.
Q. Explain to the court exactly what information Petty Officer Guidry provided to you.
A. Just that he had a conversation with Davis in berthing on the ship prior to the 6th of October. The conversation somehow got around to Davis asking Guidry if he heard about the guy that got killed, and Guidry told him that he'd been hit and jabbed by a pool stick.
Q. Who told whom?
A. Davis told Guidry.
Q. That victim had been hit and jabbed with a pool stick.
A. Yes.
Q. What information did you know as of the 20th of October as to the type of injuries that Seaman Shackleton had incurred?
A. I was at the autopsy. I saw the injuries.
Q. What were those injuries?
A. He had two lacerations on his—on the head the crown of the head and down half way below the crown of the head, half way between the neck and the crown of the head, and also a circular injury to his left temporal area.
Q. Would it be accurate to say that the information that Guidry provided you as to what Davis had told him was consistent with what you'd seen at the autopsy?
A. Yes.
Q. How much information had the Naval Investigative Service put out as of 20 October regarding the manner of death?
A. I know that we submitted one, what's called—no, we had not submitted any reports, excuse me, by the 20th of October, only to open up the investigation.

Q. How much information was generally available to the public as you are aware regarding the manner in which you believed Seaman Shackleton met his death?
A. I don't recall what the press releases were.
[158] Q. Would you characterize the volume of information as extensive or very limited?
A. It was not a long article that I recall, but I—my memory is—I don't recall how much information was passed out to the public. I know there was a whole lot of rumors all over the place.
Q. Would you characterize information regarding the injuries such as being hit and jabbed as being intimate knowledge?
A. Yes.
Q. Intimate knowledge that someone that was not within the law enforcement community or was not somehow involved with the incident would not have known?
A. Would not have known.
Q. So you had information as of 20 October, prior to talking to Seaman Davis, that he had intimate knowledge of the method of death as you understood it to be?
A. At that point in time, we were dealing with so many rumors, he could have gotten that information from any of the rumors or, possibly, he knew where the information came from and could possibly lead in that route. We did not suspect him.
Q. But you were aware that he had what you have previously described under oath as "intimate knowledge"?
A. Yes.
Q. Thank you. What information did you have regarding cue sticks that Seaman Davis might have owned?
A. I was told that he had a pool stick from other people that go to the EM Club.
Q. What kind of pool stick did he have?
A. He told us he had two.

Q. What kind had you been told that he had?

A. A pool stick, to the best of my recollection.

Q. A single continuous shaft or a shaft that can be borken down?

A. I don't believe that I asked that question.

Q. You never asked to know whether he carried a pool stick that was 5 feet long or one that was cut down, taken apart?

A. No, my assumption was when somebody owned a pool stick it was broken down.

[159] Q. So you assumed, based upon the information you had, that Seaman Davis owned several or, at least, owned a pool stick that could be broken down?

A. I was told that he had a pool stick, and that's all.

Q. So as of the 20th of October, would it be accurate to say that you knew that Seaman Davis owned a pool stick?

A. Yes.

Q. What information, if anything, did you have regarding Seaman Davis' presence at the enlisted club on the evening of the 2nd of October? All my questions, ma'am, are directed toward the knowledge which you had as of 20 October.

A. I don't believe that we even knew that he was at the EM Club on Sunday night, the 2nd of October. I don't think that was confirmed at all.

Q. Are you aware that Special Agent Clarke has indicated that he was aware that Davis had been at the club that evening?

A. On that particular evening? Please, excuse me. I've made a mistake. Tricia Dowen, an interview with Tricia Dowen and David Johnson—it may have been on the 18th. My recall has failed me.

Q. Is there anything that would refresh your memory? Do you have any notes of the conversation with Tricia Dowen?

A. Oh, I'm sure I have.

DC: Your Honor, it might be appropriate at this point to break and allow the witness to obtain those notes to refresh her memory.

MJ: Captain?

TC: Sir?

MJ: Counsel for the accused has asked that Agent Sentell obtain her notes with regard to the particular interview he's interested in at this moment.

TC: The government's understanding it's for purposes of refreshing the recollection of the witness?

MJ: No, I think he wants to look at them. The question is whether she knew that on the 20th of October that the accused had been at the EM Club, and she indicated that she wasn't really sure. She first stated that they had no such knowledge, but now she thinks that perhaps on her interview of 18 October they may have learned that, and I think she indicated that she, perhaps, had notes of that interview.

[160] MJ: Is that a correct summary?

DC: Yes, sir.

TC: The government certainly has no objection to the witness refreshing her recollection, one way or another.

MJ: Well, apparently it's imperative. Special Agent, could I ask you to obtain your notes, and we'll take recess in order—

WITNESS: Do you want me to obtain them or just to refresh my memory.

MJ: Well, if you could bring them to the courtroom with you, please ma'am.

WITNESS: Okay.

MJ: Thank you, very much, and if I could ask you to bring any other notes that might pertain to any interviews, it perhaps would save all of us some time.

MJ: Court is in recess until recalled by the military judge. Thank you.

The Article 39(a) session recessed at 1444, 15 March 1989.

An Article 39(a) session was called to order at 1502, 15 March 1989.

MJ: The court will come to order.

TC: The record should reflect that all persons present when the court recessed are again present. The members are absent, and Special Agent Sentell remains on the witness stand.

MJ: Very well, have you had an opportunity to review the notes, counselor?

DC: No, sir. Ms. Sentell has just come back in the courtroom.

DIRECT EXAMINATION (continued)

Q. Ms. Sentell, I assume that you have retrieved notes regarding the conversations you had had with Ms. Dowen?

A. Yes.

DC: May I see those, if I could, please, ma'am?

TC: Your Honor, the government would object. If this is a *Jencks*-type of an inquiry, the government's would—the government's position [161] is that this is not a witness for the government. It's a defense witness, and the *Jencks* Act is not applicable. If the—the government has no objection to the witness using the notes to refresh her memory.

DC: Your Honor, the position is two-fold. One, this witness is obviously a witness who is aligned with the

government under 611(c). It allows leading questions when a party calls a hostile witness or a witness identified with an adverse party. The situation is such that this witness is one of the key—is the lead investigator in the case in terms of soliciting and searching for information which the government intends to use to support the capital death penalty in this particular case.

MJ: The witness indicated she needed the notes to refresh her recollection. Inasmuch as she's going to refresh her recollection, examining counsel has an opportunity to see the notes nevertheless, right?

DC: We believe so, sir.

MJ: So it really isn't a *Jencks* problem. We don't have to reach that.

Very well, won't you take time to refresh your recollection, Special Agent, and if you'd be kind enough to allow Mr. Yandle to inspect them.

[Defense counsel was handed the notes for his review.]

DC: Thank you, ma'am.

MJ: Thank you. By the way, let me just note that *Jencks Act* is more restrictive than the traditional military rule of discovery, by the way.

DC: Understand, sir.

MJ: For further reference.

TC: The government would just ask to inquire of the witness what the notes are that have been provided to counsel.

MJ: If you'd like.

TC: What notes are those? Are those notes from an interview?

WITNESS: From talking with Tricia Dowen and David Johnson and a third person by the name of Rich—and his name is on—Paschard, I think.

[162] TC: The notes of interview from Tricia Down, David Johnson and a third party by the name of Richard or Rich?

WITNESS: Rich. Referred to as "Rich."

TC: Thank you.

DIRECT EXAMINATION (continued)

Q. When were these notes made?

A. The date is up on the front.

Q. And that date is what, please?

A. I believe it is dated the 18th of October.

Q. And in comparison to the interviews that were conducted with these individuals, when were these notes made? During the interviews? After?

A. During the interviews.

Q. So, as you were speaking with the individuals, you were taking essentially shorthand-type notes of what they were saying.

A. Correct.

Q. Now, you mentioned through your notes several individuals, often, by first name. One is Dave. Who is that, please, ma'am?

A. David Johnson.

Q. And Richard?

A. I cannot recall his last name.

Q. How about Jeff?

A. Jeff is Jeff Kaiser.

Q. And Bob?

A. Bob is Robert Davis.

Q. I believe on the third page of your notes, you indicate that "owns pool stick per Tricia, Dave and Rich," and listed under there is Bob Davis.

A. Do you want me to explain what I—

Q. Yes, ma'am, does Bob Davis listed under that indicate your notes say that Ms. Dowen told you that Bob Davis owned a pool stick?

A. Yes.

[163] Q. Thank you. And if you turn to the next page, the bottom indicates "Jeff left the club at approximately 1145; Bob left near closing." Does that also indicate that Seaman Davis left the club near the closing time?

A. Yes.

Q. And that would be on what date, please, ma'am?

A. The 18th.

Q. On what date would they have left the club?

A. We were talking about the night of the 2nd of October.

Q. So, in fact, on the 18th of October, you did know that Seaman Davis had been in the Enlisted Club on the evening of the 2nd of October?

A. Per Tricia Dowen, yes.

Q. So you now have information that Seaman Davis owned a pool stick. You also have information that Seaman Davis was in the club on the evening when Seaman Shackleton was killed, correct?

A. Correct.

Q. What information did you have regarding absences by Seaman Davis, unauthorized absences from his command?

A. On the 19th of October, went aboard to try and interview Seaman Davis. At that particular time, when I was up on the quarterdeck, they said that he was UA.

Q. Were you also aware of him being UA on the 3rd of October.

A. No. Not at that time.

Q. Are you certain?

A. I'm positive.

Q. Would you be surprised to hear that Special Agent Clark was aware that Seaman Davis had been UA on the 3rd of October?

A. I would be very surprised.

Q. When you had gotten on board on the 20th of October, on board the Mahan, where were you conducting your interviews?

A. Up in the Admiral's stateroom.

Q. Could you describe the layout for that for me.

A. You enter through the passageway that's across from the Captain's office. There's a round table directly to the left of the entrance to this cabin area with a bench style, semicircular seated area behind this table and two regular chairs. There's also, like, a small coffee mess over on this left side or where a coffee mess could be. There was no coffee. There was a desk in the room slightly to the right of the [164] entrance, and, if you passed by the desk, you would go into a berthing area.

Q. I assume that interviews were conducted only in the outer area with the desk and the table and the coffee mess.

A. We didn't even go as far as using the desk. We used just strictly the table.

Q. Who was present in the room?

A. At what point in time?

Q. When you were doing the interrogations.

A. During the interviews?

Q. Yes, during the interrogations.

A. We interviewed a group of people at the desk and—excuse me, at the table, Keith Clark and myself and then whoever we were interviewing.

Q. So there would have been total of three people in the room.

A. Correct.

Q. Who escorted Seaman Davis to the flag cabin that afternoon?

A. I don't know. I didn't see who escorted him.

Q. Was it a master-at-arms?

A. I know that there was a master-at-arms sitting with him earlier.

Q. Do you remember speaking with a Petty Officer Marlowe Smith?

A. Yes.

Q. What did Petty Officer Smith tell you?

A. That he was just sitting down—I'm not really clear what office he was sitting near—I think, maybe, the master-at-arms office while were talking to Guidry. Apparently, the reason being was Davis just returned from being UA, and he was sitting down there waiting for us, and he said that Davis was just real talkative and said that he didn't kill the guy but he knew who did it.

Q. So, you've got other information that Seaman Davis had some type of intimate knowledge of the circumstances involved with the death of Seaman Shackleton?

A. Yes.

Q. Prior to speaking to Seaman Davis?

A. Yes.

[165] Q. What had you been made—excuse me, what did you know prior to talking to Seaman Davis on the 20th of October regarding his statements that he might need to kill a cop to get some kind of reaction?

A. We were told that on the 20th just before we interviewed Guidry, Petty Officer Guidry.

Q. What were you told?

A. That the command was concerned about Davis' mental stability. He'd made some rash statements to his Division Officer, and they were concerned about that.

Q. Did the Executive Officer of the Mahan also tell you that he suspected Seaman Davis in this case?

A. I have no recall of that.

Q. Do you remember Petty Officer Marlowe Gene Smith telling you that Seaman Davis was extremely nervous and talkative, that he informed Petty Officer Smith that he didn't kill the victim but he knew who did and he wasn't going to tell unless it looks like he was going to get blamed for the death?

A. Yes.

Q. And you were aware of that prior to Seaman Davis entering the flag quarters where you and Special Agent Clark interrogated him?

A. Where we interviewed him.

Q. You were aware of that prior to him entering that cabin, yes or no.

A. Yes, with Marlowe Smith, yes.

Q. What did Seaman Davis tell you during that interview or interrogation?

A. Basic synopsis. We showed him a photograph of the victim, and he said that he recognized the face, but he did recognize the name, that he'd shot pool with him. He confirmed that he was the club because that was still a question in our minds as far as was he or was he not at the club on the 2nd of October. He, pretty much, explained what he did that night.

Q. What kind of intimate details regarding the method of death in this case did he convey to you?

A. He said that he had heard that the guy had been beaten with a pool stick from Bonnie and Wade—Bonnie Krusen and Wade Bielby. That was after I asked—one of us asked the question: when did he find out about this guy getting killed, and he said, "Oh, about three days later after the guy got killed." He heard it from Wade and Bonnie, and they said he'd gotten beaten with a pool stick.

[166] Q. When did he tell you that he'd been hit and jabbed?

A. He didn't tell me he'd been hit and jabbed. He said "beaten."

Q. Are you certain that he didn't say "hit and jabbed"?

A. No. He did not use those terms in the interview that we had on the 20th of October.

Q. Do you remember testifying at an Article 32 investigation back in early December?

A. Yes.

Q. In this particular case?

A. Yes.

Q. Do you remember the question:

Agent Sentell, if you would, would you elaborate on the statement "provided information during interview regarding injuries sustained by Keith Shackleton which were not publicized outside of law enforcement officials." With some specificity, what were the things he revealed?

Do you remember that question?

A. Could you repeat that, please.

DC: If I might, sir, could I approach the witness?

MJ: You may, sir.

Q. Ms. Sentell, this is page 114 of the transcript of the Article 32 investigation. If you would, please, read the highlighted portions of that.

A. [Doing as directed.]

Q. Could you read the highlighted portion, please.

A. Yes. "With some specificity, what were the things he revealed? 'Hit and jabbed.' " Now, I believe that this is not what we're talking about as far as the—

Q. Could you, please, just read the highlighted portion, question and answer.

A. I believe it is taken out of context. This is not what I said that Davis told me during the 20th of October interview.

DC: May I retrieve the document, sir?

MJ: You may.

[167] Q. Are you indicating that that's not a verbatim transcript?

A. Yes, that appears to be the transcript.

Q. But the verbatim transcript is inaccurate, is that what you're saying?

A. No, I'm not saying that, but I don't think that that was in relation to the information that I, personally, gathered from Seaman Davis on the 20th.

Q. Ma'am, let's go back a little bit then. A series of questions involved an affidavit which you prepared for the search authorization.

A. Right.

Q. Question: "Again, I'm referring back to the affidavit which you provided or you signed, . . . on 1 November of 1988." This is according to page 113 of the verbatim transcript.

The affidavit begins "Robert Lee Davis was admitted to the Naval Hospital. In the body of that affidavit, it says "During the interview of Davis," and we've established that that interview is the interviewing you're referring to as 20 October, is that correct?

A. Correct.

Q. Answer: "Yes."

Question: "And then the affidavit continues that 'During that,' what I'm assuming is the 20 October interview, 'he,' the accused, 'provided information regarding injuries sustained by Keith Shackleton which were not publicized outside of law enforcement officials.' "

Answer: "Okay, now I understand."

Question: "And what I was asking you earlier . . . that would be privileged information, privileged in

the same sense that it was—he had learned about the crime either through law enforcement officials or from somebody who saw the crime scene committed or somebody who told them about it?"

Answer: "Intimate knowledge."

Question: "Intimate knowledge." Answer: "Okay."

Further down on page 114, and you're indicating this has been taken out of context, what I'm trying to do is put it back into the context as it is in the verbatim transcript.

"With some specificity, what were the things he revealed?" Answer: " 'Hit and jabbed.' "

[168] Q. Is that correct?

A. I was referring to Guidry's information passed on to us that Davis had provided to him.

Q. Ma'am, the question which you answered under oath was this:

Question: Agent Sentell, if you would, would you elaborate on the statement "provided information during interview regarding injuries sustained by Keith Shackleton which were not publicized outside of law enforcement officials." With some specificity, what were the things he revealed?

Answer: " 'Hit and jabbed.' "

Q. Was that your testimony?

A. Obviously, I was mistaken because he did not say "hit and jabbed" during the interview. Guidry told us "hit and jabbed."

Q. Next question: "I'm sorry?"

Answer: " 'Hit' "—that Shackleton was " 'hit and jabbed.' He was hit on the back of the head. In this temporal area, he received a jab. Nobody outside the medical autopsy, Dr. Conradi or the people that were

very closely working with this investigation knew that he had been 'hit and jabbed.' "

IO: Let the record reflect that the witness has pointed to her left temporal area with her left hand.

A. That's the information that was passed on to us by Guidry.

Q. But, ma'am under this sworn testimony which you gave at the 32 investigation, you have repeatedly said that that information came from the 20 October questioning which you described as an interview.

A. My recall of the interview with Seaman Davis is that he—that the victim was beaten with a pool stick.

Q. Do you have any notes of that interview?

A. With Davis?

Q. Yes, ma'am.

A. On the 20th, I have a very, very brief—Mr. Clark was the one that was taking the notes.

Q. Question—top of page 115:

Was the information provided by Davis pertaining to the injuries sustained by Shackleton given at the beginning or the middle or the end of that interview?

Answer: Which particular interview are you talking about?

[169] Question: 20 October.

Answer: 20 October, we talked with Petty Officer Guidry before we talked with Davis, and we asked Davis where he got that information. He said he got it from Bielby.

Q. During the 20 October interview of Davis is what we're addressing. Is it your testimony today that your testimony in December was wrong?

A. What I was saying as far as pointing to my head—I remember pointing to my head, "hit and jabbed," was what Guidry told us.

Q. Ma'am, that—so, what you're saying is that your testimony that's transcribed for several pages was completely wrong?

A. No, I'm not.

Q. After you had been given repeated direction to a specific time and a specific interview, you still provided inaccurate information?

A. I must have misunderstood the question.

Q. Ma'am, you—

TC: Your Honor, the government is going to object. The witness has given a response.

MJ: You're asking the same question and you're getting the same response, Mr. Yandle. You've made your point. Should you move on, please, sir?

Q. On the 20th of October, when you and Special Agent Clark were talking to Seaman Davis in the—at sea in the flag cabin, did you make notes of that interrogation or interview?

A. No. The only thing I took down was Seaman Davis' personal data.

Q. Are you certain of that?

A. Yes.

Q. Absolutely.

A. Yes, because Mr. Clark was the one—

Q. Do you have those notes?

A. Mr. Clark was the one that was keeping the interviews for the—or the notes for this particular interview.

Q. Do you remember a question at the Article 32 that says:

During the course of that 30 minute interview, when did he provide that information? The beginning, the

middle or the end?

Answer: I would have to refresh my memory by looking at the notes that I have on this.

[170] Question: But it would be in the notes?

Answer: Yes.

Question: And you have those notes available?

Answer: Yes.

Q. Do you have those notes?

A. They're with—they're Mr. Clark's. What we do is we combine them.

Q. Your answer, ma'am, was, "I would have to refresh my memory by looking at the notes that I have on this."

A. Yes.

Q. And now you're telling us that you had no notes on it?

A. Mr. Clark and I have an agreement that some times he takes notes, and some times I take notes. We go over the notes after the interview to make sure that everything is in there, and we consider it "our" notes.

Q. At any time prior to Seaman Davis delivering a pool cue or cues to you, did you ever exercise a permissive authorization for search and seizure form?

A. No.

Q. Never verified that Seaman Davis was aware of the formalities of consenting to searches?

A. Formalities? I asked him voluntarily.

Q. But you didn't think it important to preserve that issue by executing a simple document known as a permissive authorization search and seizure?

A. No, it did not cross our mind.

DC: Just a moment, sir.

MJ: Yes, sir.

[Defense counsel conferred.]

DC: Sir, could we have about a five minute recess?

MJ: Promise five minutes?

DC: Yes, sir.

MJ: Very well, five minutes, please.

[171] The Article 39(a) session recessed at 1530, 15 March 1989.

The Article 39(a) session was called to order at 1533, 15 March 1989.

MJ: The court will come to order.

TC: The record should reflect that all persons present when the court recessed are again present. Special Agent Sentell is still on the witness stand.

MJ: Please, proceed, sir.

DC: Thank you, sir.

DIRECT EXAMINATION (continued)

Q. Agent Sentell, you'd indicated earlier that you were aware that Seaman Davis had been in the Enlisted Club on the evening of the 2nd of October from your interview with Tricia Dowen, correct?

A. Correct.

Q. Do you remember an interview with Fireman Apprentice David Frederick Johnson conducted on the USS Sierra on the 18th of October?

A. Yes. He's the one that saw him leaving, Davis leaving.

Q. So you had two separate sources of information that Seaman Davis was at the Enlisted Club on the 2nd of October, correct?

A. In my notes, I interviewed Dowen and Johnson together, and I remember that it was a combination interview and that it might have been Johnson that told me that he left near closing.

Q. But you had clear information two days prior to the time that you spoke with Seaman Davis placing him at the Enlisted Club around the time that you believe Seaman Shackleton was last seen alive, correct?

A. Correct.

DC: No further questions at this time, sir.

MJ: Gentlemen, do you have any questions of the agent, please?

TC: Yes, Your Honor.

[172] **CROSS-EXAMINATION**

Questions by the prosecution:

Q. Special Agent Sentell, Seaman Apprentice Davis wasn't the first witness you interviewed in conjunction with this death investigation, was he?

A. Absolutely not.

Q. In fact, you interviewed quite a few witnesses prior to interviewing Seaman Apprentice Davis?

A. Numerous. Numerous people.

Q. And you also interviewed a lot of witnesses after interviewing Seaman Apprentice Davis, correct?

A. Yes.

Q. A lot has been made of some testimony of your at the Article 32 investigation. In response to a 39 word question, you gave the answer "hit and jab" with regard to some information that the accused has revealed, correct?

A. I beg your pardon?

Q. In response to the question, you were asked on direct examination concerning the question:

> Agent Sentell, if you would, would you elaborate on the statement "provided information during interview regarding injuries sustained by Keith Shackleton which were not publicized outside of law enforcement officials." With some specificity, what were those things he revealed?

Q. In response to that question you answered, "Hit and jabbed."

A. Correct.

Q. That question didn't say to whom revealed, is that right?

A. That's – yes.

Q. And so it was your understanding –

A. My understanding was that the information was from Petty Officer Guidry.

Q. And that was an imprecise question, in other words?

A. I believe so.

Q. It just said things revealed by Seaman Apprentice Davis.

A. Yes.

[173] Q. And it didn't say specifically to whom, correct?

A. To whom, no.

Q. Now when you interviewed Seaman Apprentice Davis on the 20th of October, he wasn't a suspect, was he?

A. Absolutely not.

Q. Was he just a witness in the case?

A. Strictly a witness.

Q. Was he treated any different than any of the many other witnesses you had interviewed prior to the 20th of October?

A. No.

Q. Obviously, Seaman Apprentice Davis on what information you had from Petty Officers Guidry and Smith, obviously, Seaman Apprentice Davis had information not generally known, correct?

A. Correct.

Q. As far as you know, was he in receipt of anything other than information obtained by rumor, for example?

A. I had no knowledge of anything other than rumor. There were so many going on at the time.

Q. And, in fact, when you interviewed Seaman Apprentice Davis, he explained how he happened to have information concerning the case, isn't that right?

A. He said he heard it from somebody else.

Q. And specifically he told you he heard it from a Wade Bielby and a Bonnie Krusen?

A. Correct.

Q. In fact, as a result of what proved to be false information provided by the witness, now the accused, NIS wasted a considerable degree of investigative effort, didn't they?

A. Yes.

Q. His statements concerning Bonnie Krusen and Wade Bielby caused you to scrutinize their activities, correct?

A. Oh, yes. Did a lot of investigative steps on that.

Q. And the investigation, this more detailed investigation of those two individuals was a result of information you obtained from the witness, Seaman Apprentice Davis, correct?

A. Correct.

[174] Q. Now you testified that you didn't obtain a permissive search authorization for the pool cue sticks, correct?

A. Correct.

Q. There's nothing that requires a permissive search authorization if the material is surrendered to you, is there?

A. No.

Q. The accused willingly surrendered these cue sticks to you?

A. Yes, he did.

Q. Did you have to threaten him with obtaining a search authorization or anything like that?

A. No.

Q. Would it be fair to say that the accused was cooperative?

A. Very cooperative.

Q. As far as you can tell, did he appear to be hiding any information?

A. No.

Q. Was there anything about his actions that led you to believe that he was anything other than a witness?

A. Nothing. He was strictly a witness.

Q. Did you seize any other cue sticks other than those that were given to you by Seaman Apprentice Davis?

A. Yes.

Q. Approximately how many others?

A. Three others. Three other individuals gave me—

Q. From three other individuals?

A. Three other individuals.

Q. Did you take a cue stick from Bonnie Krusen?

A. Yes.

Q. Was that in part because of what Seaman Apprentice Davis told you?

A. We were taking—not "taking." We were asking if we could examine all the pool sticks that we could identify, personally owned pool sticks identified to individuals that frequented the EM Club.

Q. Was the cue sticks of the accused, were those the first cue sticks that you obtained?

A. No, they were not.

[175] Q. Were they the last ones?

A. No, I believe they were right in the middle.

TC: The government has no further questions.

MJ: Mr. Yandle.

DC: Just a moment, sir.
[Defense counsel conferred.]

REDIRECT EXAMINATION

Questions by the defense:

Q. Ms. Sentell, you'd indicated that as a result of the information that Seaman Davis had given you, you had to go back and do some other investigations. How many times did you speak with Seaman Bielby throughout this investigation?

A. Approximately two or three times.

Q. Can you give me dates on those that you spoke with him?

A. No, I cannot.

Q. But you remember speaking with him on two or three occasions?

A. I say approximately two or three occasions.

Q. You're the case agent in this, correct?

A. Yes, I am.

Q. The reporting agent?

A. Yes, I am.

Q. You're the individual who's responsible for compiling all the information?

A. Correct.

Q. How many times did Naval Investigative Service agents contact Personnelman Seaman Wade Bielby?

A. I have no idea.

Q. Yet, you're telling the court that y'all expended vast amounts of time and effort tracking information down?

A. Yes. We've got hundreds of interviews.

Q. But you're telling the court you tracked vast amounts of information, you've expended vast amounts of Naval Investigative [176] Service resources tracking down information on Wade Bielby that Seaman Davis provided. Can you elaborate on what that was?

A. "Vast amounts" is your term. We proceeded on checking out his activities. We already knew that—he said that he had been to the Howard Johnson's with Bonnie directly from the EM Club. We checked that out. We checked Holiday Inn records. We tracked down the person that was on duty at the Howard Johnson's. We talked to the person—there were some personnel on Bonnie's ship—

Q. With the interviews that y'all had conducted with Seaman Bielby, how many times did NIS agents conduct interviews—

A. With Seaman Bielby?

Q. —with Seaman Bielby?

A. [No response.]

Q. Are you aware of any other interviews of Seaman Bielby other than one done by Mr. John Lemire on the 11th of October and one done by you and Mr. Clark on the 9th of January?

A. I can't recall at this time.

Q. Now, obviously, Naval Investigative Service had information regarding Wade Bielby prior to you ever having spoken to Seaman Davis, correct?

A. Yes.

Q. How many interviews were conducted of BM3 Bonnie Krusen?

A. I do not know. I don't recall the number.

Q. . The individuals that you were able to identify as owning cue sticks, who were the four that you took cue sticks from?

A. Jeff Kraiser, Bonnie Krusen, Wade Bielby and Seaman Davis.

DC: Sir, we have no further questions at this time.

MJ: Recross, sir.

TC: Prior to making a determination whether the government will recross, the government would request

permission to reprieve the notes of Special Agent Sentell. We haven't reviewed those.

MJ: Very well, would you provide those, please, to counsel.

[Doing as directed.]

MJ: Thank you.

[177] **RECROSS-EXAMINATION**

Questions by the prosecution:

Q. Special Agent Sentell, in your notes from your interview of David Frederick Johnson and as well as those of Tricia Dowen, you were provided information concerning a number of individuals who played pool at the Enlisted Club with their own cues, correct?

A. Yes.

Q. For example, one of those was an individual by the name of Jeff who had his own—who was at the bowling alley and then came to the club afterwards and had his own pool cue in a brown case.

A. Okay.

Q. Does that sound accurate?

A. Uh-huh.

Q. So the accused was one of a number of individuals?

A. One of a number of individuals, yes.

TC: The government has no further questions.

EXAMINATION BY THE COURT

Questions by the military judge:

Q. Special Agent, when you and your colleague interviewed the accused on the 20th of October, you dealt with him in a manner that would—you've testified that he was not suspect. Was there a particular focus at that time with regard to the investigation? Was there anyone that was,

for the want of a better term, targeted as a possible suspect?

A. Absolutely not.

Q. With regard to the permissive search, you indicated that no prescribed form was used, is that correct?

A. Pertaining to obtaining the cue sticks?

Q. The cue sticks, correct.

A. No. No, we asked if on a voluntary basis, made it very clear that nobody was being forced into turning over a pool stick, nothing like that.

Q. What precisely did you tell him in that regard, ma'am?

A. Mr. Clark is the one that spoke to him directly about that particular incident.

[178] Q. Do you recall of your own knowledge—

A. He said that "Do you mind if we take this for examination?"

Q. I meant, let's return, please, to the flag quarters on board Mahan.

A. Okay. All right.

Q. What did Mr. Clark tell Seaman Davis regarding the request for search or seizure of the cue sticks?

A. Asked him if we could take a look at the pool sticks, explained it was purely voluntary.

Q. What did Davis say in response, if anything?

A. He said, "Okay," but the sticks weren't there. They weren't on board ship.

Q. And then what happened?

A. He said that they were over at his girlfriend's house, and he couldn't get off the ship because he just came back from being UA, and I said—we told him, "Well, that could be arranged, that we could get him off the ship to go get his pool sticks. He said, "Okay." He was very, very cooperative.

MJ: Very well, bear with me, please.

WITNESS: No problem.

[The military judge reviewed his notes.]

Q. Just so the record will reflect and I'm better informed, the body was found when?

A. The 3rd—well, the morning of the 3rd of October, like 5:00 in the morning.

Q. That would have been a Monday then.

A. On a Monday morning.

Q. So the night we're talking about is a Sunday night.

A. Sunday night.

Q. What time does the EM Club close?

A. 12:30.

Q. 12:30, so, 0030.

A. 0030.

[179] Q. Is it safe to say that in North Charleston, there's not an awful lot to do on a Sunday night as far as entertainment?

A. There are a couple of clubs open after that time.

Q. Oh, there are, very well.

A. Out in town, but not on base.

Q. The question was asked, and, I'm sorry, I don't remember what Special Agent Clark said. My notes are somewhat ambiguous. Were you aware of a purported unauthorized absence of the accused in that he failed to report for quarters on Monday morning, the 3rd of October?

A. We became aware of that. I believe it was on the report chit.

Q. When did you become aware of that, please, ma'am?

A. Right around the same time that we interviewed Davis and I really do not recall specifically if it was right before or right after or sometime in that general time period. I wish I could be more specific.

MJ: Very well, fine. Thank you very much. I have no other questions. Any questions based upon the inquiry of the military judge?

DC: No, thank you, sir.

TC: No, Your Honor.

There being no further questions, the witness was excused subject to recall and withdrew from the courtroom.

MJ: With regard to the 3 October unauthorized absence, at first I thought that Mr. Clark was talking about that absence and then I got the impression he was talking about the 19 October to 20 October absence. So, I must confess that I am a little confused. I'm not sure what Special Agent Clark indicated during this testimony. Again, I thought I knew and then my notes indicated that I had confused it with the later period. So, I don't know if counsel want to clear that up, how important counsel consider that to be. Is it possible, maybe, a review of the NISO report would clear up the question.

MJ: Very well, can we proceed, please?

TC: The government has no other witnesses with regard to 20 October interview or the cue sticks.

MJ: Mr. Savage? Mr. Yandle?

DC: Sir, could we have just a moment to check on it, check our notes of Agent Clark's testimony.

[180] MJ: Very well. I do remember him saying that it was his understanding that the accused had overslept at his girlfriend's house. Well, that would fit either day. So, that's not revealing.

[Recording device off.]

MJ: . . . recess rather than we all sit here watching each other going through our notes. About five minutes sufficient, counsel.

The Article 39(a) session recessed at 1558, 15 March 1989.

* * * * *

MJ: Very well, the motions are respectively denied. Those, of course, are motions that, perhaps, could appropriately be raised at a later juncture if the situation so dictates.

MJ: Anything else we can take up? Mr. Roach? Gentlemen?

ATC: Not that trial counsel is aware of that could be taken care of a few short minutes until the witness comes back, Your Honor. Your Honor, please, let the record reflect that Captain Thompson has entered the courtroom. [183] Mr. Keith V. Clark, Naval Investigative Service, civilian, was called as a witness for the court, was reminded that he was still under oath, and testified as follows:

EXAMINATION BY THE COURT

Questions by the military judge:

Q. Mr. Clark, I've asked you come back because I was confused, and you may recall that we were discussing periods of unauthorized absence of the accused, Seaman Davis, and I believe you indicated that on the particular morning or that you interviewed him on 20 October, he had been an unauthorized absentee.

A. Yes.

Q. Were you aware at that time of a previous absence, specifically, the morning of the 3rd of October?

A. At that time, on the 20th of October when I interviewed Davis, I do not believe that I had that knowledge. This personnel jacket and records were reviewed on the 25th. I don't believe it was until that date that I knew that he was UA on the 3rd of October.

Q. Now, you did testify that—bear with me, please, sir. [Examining his notes.]—that you knew that he was UA on the 3rd of October and the 20th of October. When

did you become aware of the two separate circumstances of unauthorized absence?

A. In my earlier testimony, I was unsure of when the date was that we received the service records. I feel sure now that information came from the reviewing of his service records, and I don't believe that I had that knowledge until the 25th. We were told on the 20th of his absentee on the 19th. So, I did have the knowledge.

Q. You indicated that the representations of the command, perhaps including the Executive Officer, stated or were of a mind that Davis was, in fact, a suspect, and would you, once again, recount what you're understanding of his position may have been. What did he base that on as far as you were aware, sir?

A. The only information that I know he had to base that on was the fact that we, myself and Special Agent Sentell, were interested in talking with him, and I don't recall what the exact words were, if the Executive Officer actually said that he considered him a suspect. I got that impression that he did.

Q. At that time, did he indicate to you that his suspicions were aroused by his absence on 3 October, the day after the death of Shackleton?

A. Not to my knowledge.

[184] MJ: Thank you, Special Agent. I have no other questions. Do counsel have any questions, please?

CC: May it please the court.

MJ: Certainly.

CC: Is it okay if I question?

MJ: Oh, yes, we're not going to stand on the usual protocol. You may proceed, sir, please.

EXAMINATION BY THE DEFENSE

Questions by the civilian counsel:

Q. With respect to the information provided by the command, and based on your training as an investigator, would you or would you not have requested information from the command so that you could conduct a knowing and intelligent interview of a witness or a suspect? Didn't you have any background information before you started taking people off the ship and questioning them?

A. Well, we did have some background information on Davis.

Q. And what background information did you have on Davis on 20 October when you commenced your interrogation from the command?

A. The information that we had from command when we interviewed Davis on the 20th was that he had been UA the day before and that he had made some statements which concerned the command about his mental state.

Q. What relevance, Agent, did his unauthorized absence on 19 October have to do with this investigation?

A. None that I knew of.

Q. What relevance would an unauthorized absence of 3 October have to do with his investigation?

A. That would have relevance in that that was the morning that the victim was found.

Q. And that was relevant to you, and, in fact, you had made inquiries from various commands about the absences of members of 3 October as well as injuries that members of the Navy had reported to various health facilities within the Navy command, isn't that correct?

A. I believe inquiries were made of those, yes.

Q. So that would be an important ingredient to you as of 20 October?

A. Yes, it would.

[185] Q. And you have a NIS identification of inquiries made as to UA's of 3 October, isn't that correct?

A. Of various inquiries?

Q. Yes, sir.

A. I have no direct knowledge.

CC: Beg the court's indulgence.

MJ: Surely.

[Defense counsel conferred.]

Q. When did you first look at the service jacket, if that's the proper terminology, of Mr. Davis?

A. That was reviewed and not picked up by myself originally, but it was obtained on the 25th of October.

Q. You're absolutely, positively, unequivocal that NIS did not receive that jacket until 25 October?

A. Well, I did not see the jacket before that.

Q. When I say "you," I don't mean in the singular but in the collective of you as a representative of NIS. Didn't NIS have that jacket as of 20 October?

A. Not to my knowledge.

Q. Isn't there a record somewhere within NIS as to when that jacket was received?

A. I believe there is.

Q. And couldn't you go and review that document and bring that document back here for us to make sure of when NIS had that jacket?

A. That's very possible, yes.

Q. And did you do that in preparation for your testimony today?

A. I did look at a document where we received the jacket on the 25th of October.

Q. And what document is that, sir?

A. This is a results of review of the service jacket.

Q. And has that document been provided to Captain Thompson?

A. I believe it has.

Q. When was it provided to Captain Thompson?
A. I really couldn't say what date.
[186] Q. Before today?
A. Yes.
CC: Do you have that?
TC: It's been previously disclosed, Your Honor. I can give you the exact date.
Q. What inquiries were made by NIS agents regarding unauthorized absences of members of the Navy? Do you recall that?
A. I don't recall specifically on what other agents were inquiring about or told to inquire on that. I do recall that on one occasion, we did look through UA's on the Mahan.
Q. On the Malan?
A. Yes.
Q. What date was that, sir?
A. Again, this was some date after we had—after the 20th.
Q. Is there a record of that?
A. I'm not sure if there's a record of that or not.
Q. Was there any other inquiries of any other UA's in any other commands by NIS? Any inquiries made by NIS of other commands?
A. I don't know that there was any inquiries to any other specific commands.
Q. If there had been an inquiry, wouldn't that be a good investigative tool to look to see if anybody was UA on the 3rd of October, the morning that this fellow's body was found? I mean, wouldn't that make sense as an investigator to do that? Wouldn't that be one of the first things you would do?
A. I wouldn't say that would be one of the first things that we would do considering that we would be looking at every command in the naval station, naval base.

Q. When was the first inquiry made by NIS of UA's?
A. I really don't know.
CC: Let me show you a document if the court gives me permission to approach.
MJ: You may, sir, of course.
Q. What is the date that this document was prepared?
A. This document was prepared on 11 October.
[187] Q. And when was it typed up?
A. It was typed on 3 March of '89.
Q. Prepared on 11 October '88, typed up on 3 March '89, is that correct?
A. That's correct.
Q. Is that not a document that indicates that NIS made inquiries of UA's on 11 October?
A. Yes, it does.
Q. Now, I'm going to ask you the same question I asked you earlier, Agent. When did the UA investigations commence by NIS?
A. At least by 11 October.
Q. Now, what commands were questioned by NIS regarding UA's and on what dates?
A. According to this document, UA, unauthorized absence, was requested from UA personnel on the USS Orion.
Q. On what date?
A. This is on 11 October.
Q. And when was the same document generated for the Mahan?
A. That I do not know.
Q. And where is that document?
A. If that document exists, it would be in the case file.
Q. Why would the document not exist?
A. If there was no entries or if there was no substantive information gained from that.

Q. Well, certainly if the inquiry was made, they would have learned that Davis was absent on the 3rd and that would have been very important to this investigation, wouldn't it? I mean, he is the accused.

A. Yes, he is at this time, and, like I said, I didn't do that inquiry. I may not have personal knowledge of it.

Q. Who would have that knowledge?

A. Possibly Special Agent Sentell.

CC: May I approach, Your Honor?

MJ: You may, of course.

CC: May I retrieve the document?

[188] MJ: Certainly. Do you wish that marked as an Appellate Exhibit, counselor? There is no problem making a copy of it. It will be returned to you. That's no problem, is it, Mr. Arenberg?

REPORTER: This will be Appellate Exhibit XXVII.

Q. I know this has been a long day and that you've—what time did you come on the stand this morning? Weren't you on before the luncheon break?

A. I believe it was around 10:15, 10:20.

Q. Since this morning, have you had an opportunity to refresh any notes or reports of investigations, handwritten notes or anything to refresh you memory so that it would be better this afternoon than it was this morning?

A. I have had the opportunity to review interviews pertaining to this time frame.

Q. What specific notes have you had an opportunity to refresh since your testimony this morning?

A. Just the interview with Davis on the 20th October, the interviews with Guidry on the 20th.

Q. And those are the notes that—the handwritten notes you provided us this morning, correct?

A. That's correct.

Q. Any other documents besides that, Agent?

A. That and I did look at a document that showed that we received the service record on the 25th of October.

Q. Did you have an opportunity to speak to your superiors regarding the inquiry made of the unauthorized absence on 3 October?

A. I did not.

Q. How did you obtain then the record? Where is that record that you obtained?

A. Oh, the record of the—getting the record, the service record, on the 25th?

Q. The record of obtaining the record, right?

A. Okay, that I got by talking with Special Agent Sentell, looking at the service—or actually the case file.

Q. So, you did discuss then with Agent Sentell the whereabouts of the documentation of the UA of 3 October with respect to Davis?

A. I did discuss as to where that document was. I was inquiring when I got that service record.

[189] Q. And Agent Sentell is, in fact, the one who is the reporting agent for the other UA documentation pertaining to the Orion on the 11th of October, isn't that correct?

A. I believe that was correct.

Q. Did she provide you when you discussed this 3 October question to her or when you presented her with the question of the time frame of the knowledge of NIS agents pertaining to the 3 October UA, did she identify any other documents such as the one from the Orion that's marked 11 October?

A. No, I didn't ask for any.

CC: We have no further inquiry of this witness, Your Honor.

MJ: Captain.

TC: The government has none, Your Honor.

EXAMINATION BY THE COURT

Questions by the military judge:

Q. Agent, to return to the questioning of the accused on 20 October, with regard to the 3 October unauthorized absence, and again, my notes certainly are not verbatim and very, very, fallible; so, please understand that, but my notes indicate that you questioned him about a short period of unauthorized absence and he told you that he had overslept at his girlfriend's house?

A. Yes.

Q. Which unauthorized absence did you inquire of him about?

A. That would have been the one from the 19th, the previous day.

Q. Well, why would you have been concerned about that absence since it was so remote in time?

A. Your Honor, I'm not really sure of the reason for my question at that time.

MJ: Very well, thank you. Any questions based upon that inquiry?

DC: Nothing further, sir.

MJ: Captain Thompson?

[190] **EXAMINATION BY THE GOVERNMENT**

Questions by the prosecution:

Q. Special Agent Clark, was there a result of interview generated by NIS as a result of the interview of the accused on the 20th of October?

A. I'm sorry, do you mind–

Q. Was there a result of interview report generated by NIS as a result of the interview of Seaman Davis?

A. Yes, there was.

Q. Would you recognize that document? Have you seen it before?

A. Yes, I have. I believe I would recognize it.

TC: What's the next Appellate Exhibit?

MJ: XXVIII, sir.

REPORTER: It would be XXVIII.

TC: The record should reflect that I'm handing what has been marked as Appellate Exhibit XXVIII to the witness.

Q. Do you recognize what it is I just handed you, Special Agent Sentell? [sic]

A. Clark.

TC: Oh, excuse me.

MJ: There is a definite difference.

WITNESS: [Reviewing document.] Yes. This is a results of interview, investigative action, on the interview on the 20th of October with Robert Davis.

Q. Does that document accurately reflect what, if any, information you obtained from Seaman Apprentice Davis? In other words, does it reflect what you talked about with him?

A. Yes, this does accurately reflect the information that was discussed with Davis and our activities on the 20th with Davis.

TC: The record should reflect that I am retrieving Appellate Exhibit XXVIII from the witness and handed it to the military judge.

MJ: Do you have a copy of this, Mr. Savage?

CC: Yes, sir.

[191] TC: The government has nothing further, Your Honor.

MJ: Any other questions of the agent, please?

DC: Just a moment, sir.

MJ: Surely. Well, is the service record book of the accused available?

TC: Yes, Your Honor.

MJ: What is the period of the absence? Is it recorded in the page 13 or a page 7?

TC: I don't believe it's recorded in—it was ever recorded as a page 13 or resulted in a page 7, Your Honor. The only record of it was, to the best of my knowledge, was a counseling entry from the division officer.

MJ: I assume it did not result in any disciplinary action?

TC: That's correct, Your Honor.

MJ: Anything else of the agent, please?

DC: No, sir.

TC: No, Your Honor.

The witness was excused and withdrew from the courtroom.

MJ: Anything further?

DC: Yes, sir.

DC: Captain Thompson, do you have the original medical record?

[Trial counsel delivered the requested record to the defense counsel.]

DC: Sir, could we have about a five or 10 minute recess? We're trying to track down a particular document.

MJ: Certainly you'll have your recess. What is the desires of the counsel with regard to the rest of the day? Do you wish to just—do you wish to conclude this motion or you wish to carry it until tomorrow?

[192] TC: With regard to this motion, the government would propose reserving a ruling on it until tomorrow. There are search and seizure motions that we hope to cover tomorrow, and there will be personnel from the command. One of the major issues seems to be what the perception of the accused was by the command; a suspect in a murder or whatever it might be and that could be cleared up through those same witnesses or clarified.

MJ: In other words, you have not concluded the taking of evidence with regard to this particular motion to suppress?

TC: Yes, sir, in light of Special Agent Clark's testimony.

MJ: Very well, would we be adducing any more evidence this afternoon, counsel?

DC: Sir, if we're going to continue tomorrow it may be better to, in a more organized fashion, track down the paperwork and then introduce it tomorrow morning.

MJ: Very well, anything else we can take up this afternoon, please?

CC: Your Honor, we're ready to move forward on the 4 November—

MJ: Which one was that?

CC: It was a statement taken following the arrest of the accused, Davis.

MJ: Which number?

DC: Just a moment, sir. I think it's—sir, it comes within the umbrella of 20.

TC: Yes, sir. It's part of the general motion to suppress statements under motion 20 was how we were covering the 20 October and 4 November interviews of the accused by NIS.

MJ: Oh, very well.

TC: It's entitled Motion to Suppress Statements, Your Honor.

MJ: Oh, I see, this relates then to a further interview or interrogation?

DC: Yes, sir, I think they'll agree the second was an interrogation.

MJ: Whoever happens to be phrasing the question.

[193] TC: There's probably no dispute on the 4 November one, sir.

MJ: 4 November though, he was clearly a suspect. I think that has been established.

TC: It was a custodial interrogation, sir.

MJ: Oh, that's right. He was in confinement, in fact, that day.

TC: He was confined subsequent to the interview. He had been apprehended.

MJ: My understanding was the portion of the stay at the hospital was enforced in the sense of Miranda/Tempia?

DC: That's the defense position, sir, and that will be raised at a later hearing.

MJ: Very well, sir, fine. What can we do in that regard, sir?

TC: Well, one thing, sir. With regard to the 4 November interrogation, that will require presentation of evidence by the government. There could be some length involved as far as time.

MJ: What do counsel wish to do?

CC: Whatever the court's schedule is suits us, Your Honor.

MJ: Well, I'd like to get these matters heard as quickly as possible.

TC: We have the NIS agents standing by for this purpose; so we should be able to get them.

MJ: Why don't we commence? If we can get something done—unless it encroaches on your schedule, Mr. Savage?

CC: No, that suits us.

MJ: Why don't we start, and then when it seems appropriate we can recess until tomorrow morning. Fair enough?

TC: Yes, sir.

MJ: Why don't you proceed then?

TC: Sir, we'll have to get our NIS agent back again.

[194] MJ: How long will that take? Five minutes?

TC: Yes, sir.

CC: And if she brings her notes with her then perhaps we can save another—

MJ: Would you please have them to bring their notes?

TC: Yes, sir.

The Article 39(a) session recessed at 1652, 15 March 1989.

The Article 39(a) session was called to order at 1715, 15 March 1989.

MJ: The court will come to order.

TC: The record should reflect that all persons present when the court recessed are again present. Special Agent Clark has resumed the witness stand.

Keith V. Clark, Naval Investigative Service, was recalled as a witness for the prosecution, reminded of his oath, and testified as follows:

MJ: This is with regard to the motion to suppress the 4 November statement?

CC: Well, I had—I have—

MJ: Oh, I'm sorry.

CC: I have some more questions, if he's back here, on the 20 October, if we could finish that up then we can complete—

MJ: Very well, fine. You want to continue with the motion still pending?

CC: We can complete our—that's all right, Captain?

MJ: Very well, certainly, of course, sir.

CROSS-EXAMINATION

Questions by the civilian counsel:

Q. Now, Agent, you had indicated earlier that you have checked your notes today since your testimony this morning, and in addition to that [195] you have spoken

to your co-agent or with the agent in charge of this case, Sentell, is that correct?

A. That's correct.

Q. And that you have reviewed your notes which indicated that the service member's jacket was received by you, collectively NIS, on 25 October?

A. That's correct.

Q. When in truth, and in fact, a proper review of your notes and your reports would have revealed that you returned the service member's jacket to the command on 25 October, isn't that correct?

A. That's entirely possible that it was returned the same day.

Q. Well, did you check your notes or did you not check your notes?

A. I did not check that information thoroughly. I did see that we had the information on the 25th.

Q. Did you testify under oath today that you did not have possession of the service member's jacket on 20 October?

A. Yes, I testified to—

Q. Did you testify under oath today that you received for the first time the service member's jacket on 25 October?

A. Yes, that's right.

Q. Is that correct? Were you mistaken?

A. To the best of my knowledge that is correct.

Q. Are there notes entitled "Investigative Action, Results of Inquiries/interviews aboard the USS Mahan" with respect to this case?

A. I'm sorry. Would you read the title again?

Q. "United States Naval Investigative Service Investigating Action Results of Inquiries/interviews aboard the USS Mahan." Is there such a document? Let—

CC: If I may approach, Your Honor?

MJ: You may.

CC: May I show you this document and ask if you are familiar with that?

[The witness review the document.]

Q. The question, sir, is very short. Are you familiar with the document?

A. No, I cannot say that I am familiar with this document.

[196] Q. Is that one of the documents you checked today to refresh your memory for purposes of testifying today?

A. No, it is not.

Q. Had you checked that document would that have better refreshed your memory?

A. I haven't read it thoroughly, but since it's pertaining to a 19 October attempt to locate subject aboard the USS Mahan—the title's Robert Davis; it doesn't have an ending. I'm just not familiar with this.

CC: All right. Why don't you just take a minute of your time and read, perhaps, the first paragraph of that document?

[The witness did as directed.]

Q. Have you had sufficient time to read the first paragraph?

A. Not completely.

Q. Let me ask you some specific questions about that document. You say that it is a document that reflects a 19 October inquiry to identify a subject. What does that mean, "subject"?

A. Okay. "Subject" is subject of an investigation. In this case the title reflected as Robert Lee Davis. It is not—the information could have been prepared on the 19th. However, I know that on the 19th this investigation was not titled "Subject: Robert Lee Davis."

Q. May I retrieve the document?

A. Yes [handing document to counsel].

Q. With respect to the document that you have just reviewed. Would it be accurate to say that on 19 October 1988 that you, Special Agent Keith V. Clark, upon arrival at the Mahan you were advised that subject Davis was UA? Is that true?

A. I'm sorry. Did that document state that I arrived on the Mahan?

Q. "An attempt to locate subject aboard the Mahan disclosed that he was UA."

A. I do not believe that I made a trip to the Mahan, and the inquiry, in fact, may have been by the reporting agent of that document.

Q. On 20 October '88 did you go to the Mahan?

A. Yes, I did.

[197] Q. Upon arrival at the Mahan were you advised that the subject returned?

A. I believe that information was obtained before we left to go to the Mahan.

Q. Upon arrival at the Mahan were you "greeted by Lieutenant Commander Maydosz, Executive Officer, Lieutenant (jg) Thomas Moss, subject's division officer, and ICS Kraft"?

A. Yes.

Q. Were you advised that "subject made some remarks that made him question his mental stability and that they were sending him to the medical officer for a psych evaluation"?

A. Yes.

Q. Were you also "advised that Guidry had some information that may be pertinent to the investigation of the death of the sailor"?

A. Yes.

Q. And you have testified previously that you questioned Guidry prior to questioning Davis?

A. That's correct.

Q. Did you receive subject's service record, along with the division officer's counseling records?

A. I don't believe so on the 20th.

Q. Is this document incorrect then?

A. When I read that document it seemed like the date of 25 October was in there, along that sentence.

Q. May I read the document to you?

A. Yes.

Q. "Subject's service record was provided along with the division officer's counseling records. On 25 October '88, when subject's service record was returned, Commander William E. Doud, Commanding Officer of the Mahan, advised the medical officer of the report," etcetera, etcetera. Is that how you read this document?

A. If I could see it again?

[Civilian counsel returned the document to the witness for his review.]

CC: I certainly want to give you adequate but it's a—

WITNESS: Sorry. It seems to be broken, but, yes, the period is there.

[198] Q. Does it say the records were received by you 20 October, and doesn't it further say that the records were returned by you 25 October to the command?

A. No, it does not give a date when the service record was provided along with the division officer's counseling records, and—

Q. I don't mean to quibble with you, but read the statement then.

A. Okay, the statement midway down the first paragraph states as you have read:

> Subject's service record was provided along with the division's officer's counseling records. On 25 October

'88, when subject's service record was returned, Commander William E. Doud, the Commanding Officer of the Mahan, advised the medical officer's report on subject indicated subject had an extreme personality disorder.

A. And then there's a continuation of that paragraph.

Q. When does it indicate that the records and the counseling sheets were picked up by NIS? If they were returned on the 25th, when were they obtained?

A. The way this reads, it would tend to indicate that the service records were picked up on the 20th as that's the date that was talked to, to that.

Q. Now, do you have notes, as you showed us this morning, some notes, handwritten notes or whatever, did you keep notes or did Agent Sentell keep notes? Who kept notes?

A. Well, it depends. Sometimes she would keep notes; sometimes I would keep notes.

Q. With respect to 20 October, who kept notes?

A. I believe we both had notes on 20 October.

Q. So, either your notes or her notes would reflect that, would they not?

A. I would think so.

Q. Do you sign any chits or is there any way of documenting when you receive—if you do for instance and pick up somebody's records, do you sign for those?

A. It depends on who we're getting them from and usually a service record, there's some indication if we have to leave the building with it or have to leave the ship with it. I still—

Q. Would there be—

A. I still have no recollection of obtaining the service record on the 20th.

[199] Q.—If the medical personnel on 21 October went to retrieve records, and they were not available, would there be a something in the file that would indicate where they were?

A. Again, I don't know as I don't keep the personnel records.

Q. You don't deny you had the records on the 20th now after refreshing your memory with that document, do you?

A. Well, I'm sorry that I don't really recall picking up the records on the 20th.

Q. That's not what I asked you, sir. Do you deny having the records on the 20th?

A. I do not have any knowledge of having the records on the 20th. I don't deny that—whether or not I actually had them because I have no recall—

Q. You don't deny that the official records of NIS indicates that you had them on the 20th?

A. I believe that's a little unclear because there was not a date sentence, not to split hairs.

CC: May I retrieve the document, Your Honor?

MJ: Certainly.

CC: Could I have one or two more questions, Your Honor?

MJ: Certainly.

Q. Agent, do you contest then that the—about who you spoke to that day—I mean, do you agree that the document is correct, that you spoke to Lieutenant (jg) Moss and Lieutenant Commander—the Executive Officer, whoever he may be?

A. Yes, I certainly did.

Q. And you don't deny that they told you that they were concerned about Davis?

A. No, I do not deny that.

Q. And you knew, of course, that Agent Sentell's husband was the head of psychiatry at the Naval Hospital. You don't deny that, do you?

A. No, I knew that he was a psychiatrist there.

[200] Q. Would you mind pointing out to the court the part of this statement that gives you any reservation with regard to your receipt of the records on 20 October?

A. I'm not refuting that the document is correct. I'm just stating that I don't have recall of having obtained the records and carried them off the ship back to the office. I just don't have that recall.

TC: Your Honor, at this point, the government would have to object on the competence of the witness. He said he doesn't have any recall, so there seems to be a lack of personal knowledge.

MJ: Very well, I believe Mr. Savage has completed his examination.

[Defense counsel conferred.]

Q. Do you ever recall seeing any counseling records with respect to that subject, now accused, Davis?

A. I do recall obtaining some records from the Naval Hospital. As far as having personal knowledge of actually reviewing them in detail, I don't believe I did.

Q. Well, then what would the statement, "Subject's service record was provided along with the Division Officer's counseling records," what would that indicate in this NIS report?

A. That would indicate that the records were provided and that NIS did have possession of the personnel records, and the counseling records.

CC: May I approach, Your Honor?

MJ: Certainly.

Q. The document I just provided to you, are you familiar with that document or can you tell us what that document purports to be?

A. Yes. The top part of this document is the Privacy Act Statement and then a line and key counseling points, and then there's an entry of Robert Davis, grade, social security number, and where's he attached and who the counselor was; it was Lieutenant (jg) Moss.

Q. Does it have a date?

A. [No response.]

Q. The upper right hand corner.

A. I'm sorry, okay, yes, it does. It's 3 October '88.

Q. And realizing that's, at best, a poor copy, if you could, read for us the top line at the bottom of the page under resume of reasons [201] which cause—to counseling requirements, give details, facts, dates, names, whatever else.

A. It has on the first line under that, "UA from 0700, 3 October '88 to 1400" and it looks like "3 October," again.

Q. Again, on 20 October, you were aware that the body was found—the body of the deceased was found on 3 October.

A. That's correct.

Q. And that any unauthorized absence would have been targets of your inquiry.

A. Sure.

Q. And previous inquiries have been made of other commands.

A. Yes.

Q. And that document that you have in your hand would be extremely pertinent to your investigation.

A. It would be pertinent, yes.

Q. And, in fact, it was so pertinent that it was provided to you on 20 October by, is it, Lieutenant (jg) Moss?

A. Okay, again, it was provided and if this document—if it was on the 20th, I'm sure that that is the case.

Q. And if you were provided with that document, certainly, it would have drawn your attention. I mean, you wouldn't have ignored that he was UA on 3 October.

A. It would have only interested me after knowledge of it. Just because I picked up the record doesn't mean I reviewed it that date.

Q. Well, when do your notes indicate that you reviewed that record?

A. Okay, I do not have notes that indicate that I personally did review that record.

CC: Beg the court's indulgence one moment.

[Defense counsel conferred.]

CC: Your Honor, do we then offer—what I want to do is offer both these documents for the—do we offer them separately?

MJ: Yes, certainly. I think it would be easier to identify.

CC: May I approach? Your Honor, we would ask that the court have an opportunity to review those documents in case the court would like further inquiry of this witness.

[202] MJ: That is XXIX and XXX.

REPORTER: Yes, sir. That would be Appellate Exhibits XXIX and XXX.

MJ: Any further examination, Mr. Savage?

CC: No, sir.

MJ: Captain, do you have any examination of the witness?

TC: Your Honor, with regard to the exhibits offered by the government, rather by the defense, the government would ask for clarification of which exhibit is which as far as numbers.

REPORTER: XXX is the results of inquiries/interviews, 19 October, and—I'm sorry, XXIX is that one. XXX is the key counseling points.

TC: The government requests the number of pages in Appellate Exhibit XXIX.

REPORTER: XXIX has one page.

TC: Your Honor, the government would object to XXIX under Military Rule of Evidence 106 and request that the entire document which is—make it into a three page document.

MJ: Well, you can always—

CC: We'd be glad to see it. I've never seen any additional information with respect to this.

MJ: You can take a look at it, and if it needs to be augmented, Captain, certainly, we'll be prepared to do so.

[Defense counsel examined the document.]

CC: I don't have any objection to that, Your Honor.

MJ: Very well.

CC: Of course, the relevance is up to 20 October.

MJ: What do the other two pages add?

TC: The other two pages, there's been great emphasis on the fact that the accused in this case is referred to as "subject," and what the other two pages tell you, the last page tells you, that the document was prepared on the 4th of December, typed on the 4th of December and it was done by Agent Sentell.

[203] MJ: Very well, fine. Thank you.

MJ: Do you have any objection of the agent, please, Captain?

TC: Yes, sir, if I may use Appellate Exhibit XXIX to do so.

MJ: Certainly, please, proceed.

TC: The record should reflect that I have handed what's been marked as Appellate Exhibit XXIX to the witness.

DIRECT EXAMINATION

Questions by the prosecution:

Q. Special Agent Clark, there's been reference to the use of the terminology "subject" in reference to Seaman Apprentice Davis. Does that reference, "subject," does that reflect the status of Seaman Apprentice Davis on the 19th of October or does it reflect the status of Seaman Apprentice Davis when that document was prepared?

A. It reflects the status of Seaman Apprentice Davis on the date that the document was prepared, and that on was 4 December '88.

Q. Seaman Apprentice Davis was the subject of the case, the investigation, on the 4th of December?

A. On 4 December, yes.

Q. And you testified earlier as to when he became the subject of the investigation approximately. Do you remember when that was?

A. Approximately—this was around the time frame of 1 November, the first of November.

Q. Around the first part of November?

A. Yes, prior to that—

Q. Prior to the preparation of this document, but subsequent to the 20th of October?

A. Yes. Correct.

Q. Does that document reflect the title of the case investigation?

A. Yes, it does.

Q. And what is that title?

A. The title is "S," which stands for subject, /Davis, Robert Lee/OSSN/U.S. Navy.

[204] Q. To the best of your knowledge, did this investigation concerning Seaman Shackleton's death, did it always have the same title?

A. No, it did not. We carried it under the victim title with Shackleton's name up until the time that Davis was considered a suspect.

Q. So after the time—after Seaman Davis became a suspect around the 1st of November, the title of the case investigation was changed.

A. That's correct. Davis was added in the subject line.

Q. And the subject—and the victim was deleted?

A. The victim is stated in the full title but it's a victim line underneath the subject line.

TC: The record should reflect that I am retrieving Appellate Exhibit XXIX and return it to the court reporter. The government has no further questions, Your Honor.

MJ: Any further examination of the agent, please?

CC: Nothing further, Your Honor.

There being no further questions, the witness was excused and withdrew from the courtroom.

MJ: I would think that it probably might be appropriate to secure for the evening rather than try to commence taking in evidence on other motions. Is that agreeable with counsel?

TC: Yes, sir.

DC: Sir, we have no further evidence to present on this particular motion and are prepared for argument, if you would like to entertain that now.

MJ: We've been going at this pretty heavy, why don't we secure until tomorrow morning. Is that going to present any problems to counsel?

DC: At your pleasure, sir.

TC: No, sir. One thing the court would note is that with regard to one of the search and seizure motions, the government intends to call the Commanding Officer of the USS Mahan, and, because of his role, we've got a certain window that we need to put him in as far as his testimony,

if we can. We've made arrangements to have him testify around 10:00 o'clock morning if we could.

MJ: I'm sure that regardless of what we're doing, we can accommodate the Commanding Officer.

[205] TC: The government has nothing further then.

MJ: Very well, we will adjourn until 0845. Is that convenient or make it earlier or later?

DC: At your pleasure, sir.

MJ: 0845. Thank you very much.

The Article 39(a) session recessed at 1740, 15 March 1989.

* * * * *

[264] MJ: Anything further, please, counsel? Captain?

DC: Sir, in light of the factors as stated in *Tibbets,* we would like to offer, if we could, one further Appellate Exhibit which are the notes of Special Agents Sentell and Clark of the interview of 20 October for your consideration, sir. That would be what Appellate Exhibit?

REPORTER: XXXVI.

DC: I'd offer it to the court at this time, sir.

MJ: Very well, thank you.

MJ: Very well, the military judge makes the following findings of fact:

That the accused, Seaman Davis, was among a group of servicemembers who were at the Enlisted Mens' Club on 2 October 1988, played pool, owned his own pool cue, and left the club at closing;

That Seaman Shackleton's body found at about 0500, 3 October 1988;

That the accused was an unauthorized absentee from 0700 to 1400 on 3 October 1988 and that upon discussion with his Division Officer, the offense was handled administratively;

That Naval Investigative Service was aware that a pool cue was likely the instrument which caused Seaman Shackleton's death;

That the accused was in a status of restriction and under escort when he was called for questioning by the Naval Investigative Service;

That the agents on 20 October 1988 did not consider him to be a suspect;

That the agents were aware of what the accused had purportedly told Guidry and that he had heard that Seaman Shackleton had been hit and jabbed;

That Fire Controlman Second Class Smith, duty master-at-arms, told the agents the accused told him that he didn't kill Seaman Shackleton but he knew who had killed him;

That various rumors were rife concerning the death of Seaman Shackleton;

[265] That the dynamics and specifics of the injuries suffered by Shackleton were closely held;

That some members of the USS Mahan, including the Executive Officer, believed the accused was a suspect;

That after learning of the statements attributed to the accused, the agents continued to treat the accused as a potential witness vice a suspect;

That consistent thereto a verbal consent to seize his cue sticks was obtained rather than the execution of the more formal document;

That the agents' actions were consistent with their approach as to the accused's status;

That the accused told the agents he was at the Enlisted Mens' Club, shot pool and related his activities after he left the club and identified a certain Albertha Lynn Heffner as a person he was with;

That he told the Naval Investigative Service agents he heard about Seaman Shackleton's death about three days after it occurred and that Wade Bielby and Bonnie Krusen told him he was killed with a pool cue;

That he told the agents he had two cues at Ms. Heffner's residence;

That he consented to the seizure and participated in the recovery of those cue sticks;

That following the interview with the accused, the pace or focus of the investigation did not dramatically change, rather the Naval Investigative Service continued the investigation including following the leads provided by the accused which proved, apparently, unproductive;

That the agents, after questioning of the accused, subjectively did not consider the accused a suspect;

That the recovery of the cue sticks were a direct result of the 20 October 1988 interview.

MJ: The investigation concerning the death of Seaman Shackleton started with little more than the body discovered at 0500, 3 October 1988. As the investigation developed, it narrowed with medical evidence and opinion and the elimination of various of possibilities. The most likely instrument of the fatal injuries was a pool cue and the Naval Investigative Service undertook to identify those persons who used the Enlisted Mens' Club and had personal cue sticks.

[266] MJ: When Special Agents Sentell and Clark came on board Mahan on 20 October 1988 to question the accused, he had returned from a short period of unauthorized absence. They became aware of that particular absence, his restriction and his statements to Guidry and Smith. They also knew of the statements to his Division Officer and the command's intention to seek a neuropsychiatric evaluation. They questioned him without warnings and, from the testimony and exhibits, the accused provided explanation of his whereabouts after 0030, 3 October 1988 and his knowledge of the death of Seaman Shackleton. Determination as to the agents as to whether the accused was a suspect as of 20 October were testified to by them and is supported by the conduct of the questioning.

Moreover, the routine reaction of the agents following the questioning is also consistent with their testimony that they did not consider the accused a suspect until on or about 1 November. Such subjective assessment must be given due consideration but the test is were the facts which were known of such a nature that a reasonable person would have suspected the subject.

With regard to the short period of unauthorized absence, while the investigators were seeking information as to unauthorized absences as of 3 October, such information would only be relevant if it suggested something such as flight by the perpetrator. In this instance, the fact of a short unauthorized absence which would only tend to draw attention to an individual who could have obviously been at quarters at 0700 would tend to suggest a contrary inference.

The circumstances of the statements of the accused to Guidry and Smith indicated to the agents that the accused may have had intimate information. Full statements included the clear disclaimer of guilt by the accused. The

statement to Smith was made while the accused was awaiting questioning and he was, according to Smith, extremely nervous and talkative and related that he would tell who it was if he was going to be blamed. According to Petty Officer Smith, the accused said the person knew martial arts. The agents' evaluation of these statements must be weighed in light of the accused's outburst to his Division Officer that he wanted to kill cops because they would kill him, that he wanted to shoot cops because they would kill him.

From the totality of the situation, it would have been reasonable for the agents to have discounted the inherent value and efficacy of all the accused's statements and to have proceeded to determine what he actually knew and continue with their investigation. Had they done otherwise, they would have had their only identified suspect almost immediately taken to the Squadron Medical Officer, given a neuropsychiatric evaluation and, later, admitted to the psychiatric ward at the Naval Hospital Charleston.

[267] MJ: With all the circumstances, the military judge finds that the accused was not a suspect on 20 October and no Article 31 UCMJ warning was required. Accordingly, the motion to suppress is denied.

MJ: Very well, are you ready to proceed, counsel?

TC: Yes, Your Honor. Your Honor, we presented the evidence on the—regarding the search and seizure on 1 November with regard to the locker on the ship.

MJ: I thought there was still evidence to be taken in that regard. That is why I did not address it, and, of course, I did not entertain argument in that regard.

TC: The government intends to present no further evidence, and we have no preference as to argument. We could argue it now for the sake of convenience or later.

MJ: Your desires, gentlemen?

CC: We have nothing further to present on that. We thought that was closed as well.

MJ: I'm sorry, Mr. Savage.

CC: I thought that we had finished that as well.

MJ: Of course, there had been no specific argument on that, and that's why I didn't think that it had been concluded with regard to presentations.

DC: We can argue now or we can argue at the conclusion of the next motion, sir, whatever your pleasure is.

MJ: The next motion would be?

TC: We have additional witnesses concerning, I believe, it's motion 20, sir, and that's the general motion, sir, with regard to the statements and these witnesses are additional personnel to whom Seaman Apprentice Davis had made admissions to.

MJ: Oh, these were purported statements at the hospital, is that correct?

TC: No, sir, these were other admissions on board the Mahan or personnel, shipmates, of the accused that haven't been addressed previously.

* * * * *

[294] Jeanmarie Sentell, Civilian, was recalled as a witness for the prosecution, was reminded of her oath, and testified as follows:

DIRECT EXAMINATION

Questions by the prosecution:

Q. Ma'am, earlier you testified concerning an interview of the accused on the 20th of November—excuse me, the 20th of October 1988. Subsequent to that did you have any other occasion to talk to Seaman Apprentice Davis?

A. Yes.

Q. When was that?

A. On the 4th of November 1988.

Q. On the 4th of November 1988 what was—earlier you had testified that he was considered a witness back on the 20th of October. [295] What was—did you consider his status as of the 4th of November?

A. At this point in time, we suspected him in the investigation into the murder of Keith Shackleton.

Q. Where—you said you talked to him, where did you talk to him at?

A. At the Naval Investigative Service Office.

Q. And what were the circumstances of that? For example, had he been apprehended or did you call him in?

A. He had been apprehended by some other agents that brought him to my office.

Q. So, the interview took place at NIS headquarters or the NIS office on board base?

A. Yes.

Q. Where within that NIS office did the discussion take place?

A. One of the middle offices, interview room.

Q. Could you describe that room?

A. The room has got a desk in it, some file cabinets, three or four chairs in it, a sink in it.

Q. Who was present during the interview of the accused?

A. Just Keith Clark and myself.

Q.. Do you remember about what time the interview began?

A. At approximately 1630.

Q. Could you give us the sequence of events. What happened when you first brought Seaman Apprentice Davis into the room?

A. I read him his rights. What we did was we completed a form that's called the "Military Suspects

Acknowledgement and Waiver of Rights Form." I identified myself and Special Agent Clark identified himself, and we informed him that he was suspected of the homicide of Keith Shackleton, and then we proceeded—I proceeded to read him his rights straight from the form. At that point in time, after I completed reading his rights, I asked him if he understood his rights as they were read to him. He said yes. I asked him if he wished to consult to a lawyer—with a lawyer prior to any questioning, and he said no. I then gave him the waiver of rights form, asked him to please read it, to let me know if there was anything that he did not understand; a word that he didn't understand or if there was any part of his rights that he did not understand, and after he read the form, I asked if he had any questions, and he replied no. Any questions about the form or about his rights, and he said no, and I asked him if he would answer some questions about the allegations, and he said yes, [296] because he didn't kill anyone, and then he signed the form. Then Keith and myself signed the form.

TC: What's the next appellate exhibit in order?

REPORTER: XXXVII.

TC: The record should reflect that I'm handing what has been marked as Appellate Exhibit XXXVII to the witness.

Q. Ma'am, do you recognize what it is I just handed to you?

A. [Examining exhibit.] Yes, I do. This is the Military Rights/Suspect's Acknowledgement and Waiver of Rights form that I just spoke about.

Q. Do any signatures appear on that form?

A. Yes.

Q. And whose signatures are there?

A. Robert Lee Davis, my own, and Keith Clark.

Q. And is that the form you used on the 4th of November?

A. Yes, it's a copy of it.

Q. After executing this form did you interview Seaman Apprentice Davis at all?

A. Yes.

Q. Did he talk to you freely?

A. Yes.

Q. Prior to interviewing him, did you make it clear that if he wanted to terminate the interview that he could at any time?

A. Yes, that's right in the waiver of rights.

Q. What was Seaman Apprentice Davis' condition? Did he appear to be sober, for example?

A. Yes, he did.

Q. Prior to interviewing him was he threatened in any way?

A. Not to my knowledge, no.

Q. What about during the interview?

A. No.

Q. How long did the interview last, approximately?

A. Approximately two and a half hours.

[297] Q. Did you have any breaks at all during that period of time?

A. Yes, we did. About an hour and a half into the interview or interrogation, whichever way you want to look at it, we had about a seven minute break.

Q. What was the purpose of that?

A. To see if he wanted a drink. I believe he wanted his chewing tobacco, his Copenhagen.

Q. Those items were offered to him?

A. Yes.

Q. How did the interview eventually end?

A. He asked for a lawyer.

Q. And did all the questioning stop at that point?

A. Oh, yes. Right then.

Q. Did Seaman Apprentice Davis make a written statement?

A. No, he did not.

Q. Did you ask him to make a written statement after he had asked for a lawyer?

A. No.

TC: The government has no further questions.

MJ: Gentlemen, do you have questions of the agent, please?

CROSS-EXAMINATION

Questions by the defense (Mr. Savage):

Q. Did you bring your notes?

A. Yes, I did.

Q. May I see them, please?

A. Yes [handing document to civilian counsel].

Q. Within the confines of the NIS office here in Charleston, do you have any equipment that would lend itself to a video or an audio record of interrogations of suspects?

A. Do we have access or do we have it rigged up in the—

Q. Do you have access to video or audio equipment?

A. We have access to, yes.

[298] Q. And on the 4th day of November did you use the equipment in your custody to record either in a video fashion or an audio fashion the conversation or the interrogation or the interview with Mr. Davis?

A. No, we did not.

Q. At the time you commenced that interrogation you knew that this was a murder case?

A. Homicide, yes.

Q. And you knew this was the most important case that you, Agent Sentell, had ever been involved with, isn't that correct?

A. Correct.

Q. And the equipment was available?

A. If we wanted it, yes, I'm sure it was available.

Q. And if that equipment had been utilized we would have a complete record of what went on in that room that day, isn't that correct?

A. That would be correct.

Q. And you chose not to do that?

A. We chose not to use video or any kind of equipment.

Q. Why was that?

A. It was our decision not do such a thing. It was not a common practice.

Q. Well, this isn't a common case is it?

A. No.

Q. What's the basis of your decision not to use equipment that was available to record that interview?

A. We don't do it normally.

Q. It wasn't important?

A. I wouldn't even say that it was a consideration. It was not that it was important or not.

Q. Now, with respect to your experience as a NIS agent, you have on a number of occasions utilized interview techniques with suspects, isn't that correct? You've interviewed a number of suspects before, correct?

A. Yes, I have.

Q. And you know about Article 31 rights?

A. Yes.

[299] Q. And does the NIS have forms—for instance, earlier today you indicated that you have a form for a waiver of search. NIS has a waiver of search form, correct?

A. A permissive search authorization?

Q. Permissive search, right.

A. Yes.

Q. And you didn't utilize that?

A. No, we did not.

Q. Does the NIS have a waiver of rights form?

A. Yes.

Q. Does it have more than one form?

A. We've got a civilian waiver of rights form.

Q. Do you have a copy of that with you?

A. No, I don't.

Q. Would you kindly make one available to me so that I can review it some time between now and tomorrow?

A. Sure.

Q. Is the material contained in the civilian waiver of rights form the same as the military waiver of rights form?

A. No, it's slightly different, and it's pretty much obsolete at this point. For a couple of years it's been obsolete.

Q. What makes it obsolete?

A. The civilian suspect's acknowledgement of rights. We haven't used—

Q. Well, is the civilian an acknowledgement of rights form or a waiver of rights form?

A. Acknowledgement and waiver of rights form.

Q. That's the civilian one?

A. So is the military one.

Q. And I'd like to hand you a document and ask you if you can identify this as the form that the NIS uses for acknowledgement of rights [handing document to witness]? That document which you have is a reproduction of Appellate Exhibit XXXVII, is that correct?

A. [Examining document.] Yes, it is.

Q. May I retrieve that?

A. Yes [handing document to counsel].

[300] Q. You're familiar with this form?

A. I—

Q. Not this particular form, but the form of the form?

A. Yes, I am.

Q. And it is a fairly accurate form in terms of the rights that one is entitled to, isn't that correct?

A. Correct.

Q. Now, how does somebody on this form indicate waiver of their rights? Where do they sign to indicate that they waived their rights?

A. It says—there's a paragraph right here; it says "I understand my rights as related to me and set forth above. With that understanding, I have decided I do not desire to remain silent, consult with a retained or appointed lawyer, or have a lawyer present at this time. I make this decision freely and voluntarily." Okay, this is the waiver of rights.

Q. Okay. Now, and that is the signature that Robert Lee Davis signed in the signature blank below that, correct?

A. Yes, it is.

Q. Which would indicate that he waived his rights?

A. Correct.

Q. Now, where on this form would he sign to invoke his rights?

A. If he told us that he did not wish to talk to us, then we would stop right then and there and he would not have to sign this form, and neither would we.

Q. Well, where would there be a record of him invoking his rights in the NIS file? If he invoked his rights and said he did not want to waive them, where would he sign the document?

A. He wouldn't need to sign the document. By not signing the document means that he wishes to remain silent. Okay, this is the way that we utilize the form. Okay?

Q. On this form it says "At this time I desire to make the following voluntary statement" and it says date and time?

A. Okay.

Q. Why, if you now offer a statement that he made, why wasn't this form completed that at a particular date and time he, Davis, initiated a voluntary statement?

A. Okay. Whenever we take a written statement from somebody that has been apprised of their rights, we've talked to them about the matter and they said that they would like to give a written statement or they will give a written statement, the written statement commences [301] on this front page of the form. We start off the whole statement on this form, and then we proceed on another piece of paper, should it take longer which is normal, but this is only after the person has agreed to provide a voluntary, written statement.

Q. So it's fair to say that the only possible documentation that NIS would have is somebody who waives their rights?

A. I beg your pardon?

Q. Well, if somebody invoked their rights, there's be no record of it any place. If they waive their rights and give a verbal statement, there's one signature block.

A. Correct.

Q. If they waive their rights and give two statements, one verbal and one written, there's another signature block.

A. Correct, and that's why we do a results of interview.

Q. Well, do you think that that form then is geared to have somebody invoke their rights?

A. I don't understand.

Q. Do you have another form that says I invoke my rights?

A. No, we don't.
Q. There is no form for that at all?
A. No, no.
Q. Now, do you have the originals of the forms that were used?
A. Yes. They are back at my office, the original.
Q. I notice that the times on the forms on the copies that I have have been changed. May I assume that the original times were changed on the original form as well?
A. Which one are you talking about?
Q. The arrival, the time entered the room, the time the suspect waives the rights, the times that a rest period was taken.
TC: Excuse me, sir. Appellate Exhibit XXXVII consists of just the waiver of rights form. The document you have there is probably the interrogation log, and that—
CC: I apologize. Let me—may I approach?
MJ: Of course, you may.
Q. Are you familiar with this document, Agent Sentell?
A. Yes.
[302] Q. Is that part of what you have there with you or is that the only copy you have?
A. This is the only copy that's here. I have the original back in my office.
Q. That's referenced as the document you have, and we will mark that as Appellate Exhibit—
REPORTER: Yes, sir.
Q. That is a log which is kept by an interviewing agent?
A. Yes.
Q. And as I said, the times all seem to be changed on there.
A. Okay, may I explain that to you.

Q. That's what I was going to ask you to do.
A. Okay. He came in at 4:28 regular time. I made the error. It is 1628 military time. I was trying to keep it in military time, and it was my error, that it was not 4:28 p.m., it was 1628 hours. Do you understand what I was trying to do here, that I was trying to keep it in military time and I slipped back to regular time, and that's why I initialed it; that's why I had the third error down, I initialed it and also Mr. Clark who was present initialed it because they were mistakes made in converting from regular time to military time.
Q. All right, and that would only affect the first two digits, would that by correct?
A. The third digit also because I looked at my watch, and I thought it was 18 and it was not or 16 and it was not.
Q. But that would only affect the first two digits in the military time as opposed to civilian time, isn't that correct?
A. Correct.
Q. All right, now, what time did Mr. Davis get out of the hospital, do you know?
A. I'm not positive. I believe it was around 4 o'clock, but I was not there so I don't know.
Q. All right, you sent other agents to pick him up. Did they pick him up at the hospital?
A. Yes. Mr. Clark and, I believe, two other agents.
Q. And he was brought from the hospital to NIS headquarters?
A. To our office, not the headquarters but the resident agency.
[303] Q. But where you work?
A. Yeah.
Q. And you advised him of his rights and he said he'd go ahead and make a statement
A. Yes.

Q. And you took a break, according to your log, at 1757. I have an almost illegible copy. Is that what that copy reflects?

A. Yes.

Q. And when did that break end?

A. At 1805.

Q. And does the rest break indicate to you that there was a mistake made on that time as well?

A. Yes.

Q. And what was the mistake that was made that time?

A. Five, it should have been a 17.

Q. Originally, it was 5:57, you changed it to 1757.

A. 17, yes.

Q. And when did the break end?

A. At 1805.

Q. And my copy appears to be 1808.

A. No, it's 1805.

Q. All right, was that changed later on?

A. No, it was changed right then and there. I looked at my watch and I started writing, and then I looked at my watch, it was 1805.

Q. Does your copy say 1808 or 1805?

A. 1805.

Q. So, if I'm reading the 1808, that's my misreading of the document, correct?

A. Well, it's because I had a problem with 1804-1805. Started out as 1804, I looked at my clock, it was 1805.

Q. Why was the rest break initiated at 1757?

A. It was just a matter of asking him if he wanted a soda or something to take a breather.

[304] Q. And how does that reference to the time during the interview that he made a comment that he wanted to lawyer?

A. He made that comment just before the break. After we resolved that issue, we continued on with the interview for a few more minutes.

Q. Well, in your report of investigation, it indicates that "at 1743, subject made a comment that, maybe he should talk to a lawyer, and all questioning stopped." What took place between 1743 and 1757?

A. We talked a little bit longer.

Q. Well, I thought the questioning stopped?

A. After—I beg your pardon.

Q. At 17—I'm reading from your notes now. "At 1743, subject made a comment that maybe he should talk to lawyer. All questioning stopped." Now, is it—are we correct, do you have a copy of the NIS report?

A. Yes, I do.

Q. I'm referring to, I guess, page 2 of a three page report, is that correct?

A. Correct.

Q. Full paragraph, the first full paragraph, that's actually the second paragraph on the page, it says "at 1743, subject made a comment that, maybe he should talk to a lawyer." Is that correct?

A. Yes.

Q. All right, the time is correct and the content of the statement is correct.

A. When I reviewed and compared it to my notes, I noticed that there was a typographical error, it was 1753.

Q. So, when he made this comment about asking for a lawyer, it was not at 1743, your notes reflect it was at 1753.

A. My notes reflect 1753, but there's a typographical error on this report.

Q. When did you first notice that?

A. When I was reviewing my notes yesterday, I believe.

Q. And with respect, again, to the break that was taken, that was taken at 1757.

A. Correct.

Q. And the break then right after he asked you to speak to a lawyer, four minutes by your log.

A. Correct.

Q. Following the break, did you readvise him of his rights?

[305] A. We verbally said you understand that you're still—this is—I've forgotten the wording that we used but it was basically, you understand your rights are still in effect, something to those words. I don't recall my exact words.

Q. Did you fill out another waiver of rights form?

A. No, because it was not a long period of time. In fact, I don't think we're even required because it was only a few minutes break.

Q. But you did do it nonetheless? I mean, you thought it was important enough in this particular case to do it.

A. In this particular case, it was still letting him know that, hey, your rights are still—

Q. Was that documented on the log form?

A. No.

Q. Was it documented on your notes?

A. No.

Q. And you continued his questioning at that time.

A. Yes.

Q. The information regarding that was provided to you by Mr. Davis regarding his T-shirt—

A. Yes.

Q. Was that done before the break?

A. It appears in the sequence on this. If you want to compare it to my notes—

Q. Well, I don't know. I wasn't there. I'm asking you when it was provided.

A. Yes, it was before.

Q. And did he advise you of the source of the blood that was on his T-shirt?

A. Yes, he said it was from his wisdom teeth.

Q. And did you confirm that?

A. Yes, we did.

Q. When was that done?

A. I could not give you an exact date.

Q. Well, was it done before or after you questioned him about it?

A. It was right afterwards.

[306] Q. Did you know that there was blood on a pillow and a sheet in his bunk before you interviewed him on 4 November?

A. I don't recall.

Q. Well, wouldn't the blood on a sheet and pillow be pretty important—

A. I don't want to get out of time sequence again like I did before. I would have to refresh my notes on that to be absolutely certain.

Q. Well, I am referring to your notes dated 4 November, page 2. "Re. T-shirt, wisdom teeth removed Tuesday, 25 October, teeth, gums draining, had towels with blood, threw them out, gagged on gauze, threw out, blood should still be on pillow and bed sheets."

A. I know that we've obtained the bed sheets but I can't give you and exact date.

Q. Do you know whether or not prior to your interviewing Mr. Davis at the NIS office, headquarters, whatever, the 4 November date, whether or not he was advised of his Article 31 rights before he got there?

A. No, I don't.

Q. Do you know whether he was advised of his rights at the hospital?

A. No, I don't. Direct knowledge of it, no. Mr. Clark told me he gave the rights.

Q. Do you know whether any hospital personnel advised him of his rights?

A. Specifically, no, I do not know.

Q. Specifically your husband?

A. I don't know.

Q. Specifically you have an affidavit in your case file from your husband, isn't that correct?

A. If it's in the medical record, I would have to look at it.

Q. You're not aware of an affidavit signed by your husband with respect to his involvement in this case?

A. The statement that he provided?

Q. An affidavit that he provided.

A. An affidavit? In the medical? I know that he has provided something, a statement, yes.

Q. You were the case agent in charge of this case when he provided it, weren't you?

A. I was confused with your time as far as in the hospital.

[307] Q. My question is: do you know whether or not his Article 31 rights were presented to him in the hospital, Davis.

A. I don't recall.

Q. Now, Davis was taken from the hospital to NIS, correct?

A. Yes, he was.

Q. What efforts were made, either by you or any other agents at NIS, to obtain a lawyer for him?

A. None to my knowledge.

Q. Well, you said at one point, at 1753, he requested counsel, and you, apparently, talked him out of it at that time. You took a rest break, you calmed him down, and he

decided he didn't want a lawyer at that time, isn't that correct?

A. No, it's not correct.

Q. Isn't that what your notes reflect?

A. [No audible response.]

Q. I mean, he asked for a lawyer.

A. Yes.

Q. At 1743 or 1753, and all questioning stopped. Was any attempt made at that time to obtain a lawyer for him?

A. No, we clarified the situation. He did not want a lawyer.

Q. When you say, "we," are you referring to Clark and Sentell?

A. Correct.

Q. At what time did he tell you again that he wanted a lawyer?

A. At 1857.

Q. And what efforts were made at that time to obtain a lawyer for him?

A. We called the ship and we said that he has asked for a lawyer and to, please, do what needs to be done. We, personally, did not contact a lawyer. We advised the ship that he has requested a lawyer and to make it happen.

CC: Beg the court's indulgence for one minute.

MJ: Certainly.

[Defense counsel conferred.]

Q. In previous cases that you've had on base here at Charleston [308] Naval Station, have you initiated phone calls to legal services to see if a lawyer was available?

A. No, I have not.

Q. You've never done that?

A. No.

Q. Has anybody working with you ever done that?

A. I have no knowledge.

Q. Have you ever directed a suspect to go to legal services?

A. I don't know. I don't recall.

Q. With respect—I know you told us earlier there was a sink and all in the room. When Davis was brought over there, was he shackled, as he was transported to court now? Did he have leg irons on and handcuffs?

A. He had handcuffs on.

Q. No leg irons?

A. Not that I recall.

Q. When he was in the office—

A. Yes.

Q. —was he in custody in some sort of—in fixed custody with restraints?

A. Yes, he did. He had handcuffs on one arm and he was handcuffed to the chair that he was seated at.

Q. While you were interviewing him is what I'm talking about now, not during a break or something, but when you were interrogating him, how was he restrained?

A. That is the manner in which he was restrained.

Q. He was handcuffed to the chair he was sitting in?

A. Yes.

CC: That's all we have, Your Honor. Thank you.

MJ: Captain.

REDIRECT EXAMINATION

Questions by the prosecution:

Q. Special Agent Sentell, there's mention of the fact that you didn't record either audio-wise or visually the interrogation of the [309] accused on the 4th of November. Is it the practice of NIS to do that?

A. Not on a normal basis at all.

Q. Have you ever done that?

A. On a witness, yes, I have one time.

Q. What about a suspect?

A. Never on a suspect that I recall.

Q. With regards to the rights form, does a suspect or someone being interviewed by NIS, do they have to do something? Do they have to take some sort of action in order to waive their rights? Does it require them to do an affirmative act?

A. Yes, they have to sign the form. Sign and date it and give the time.

Q. And that creates a record?

A. Correct.

Q. If someone asks for a lawyer, when you go to interview them, what's the practical result of that?

A. We don't question them any further or we don't question them at all. If it's at the beginning of an interview and they say I want to talk to a lawyer first, fine, no problem.

Q. So, from your experience if you went—if the individual went and talked to a lawyer, what do you think the chances are of him speaking further to NIS?

A. Chances are pretty slim.

Q. So, is it general practice just to forget the interview if the individual wants a lawyer?

A. Normally, yes, unless they come back with their lawyer or say that they've decided to talk to us.

Q. Regarding 1753 when the accused made mention of a lawyer. You can refresh your recollection from your notes if you desire. Did Seaman Apprentice Davis say, "I want a lawyer," or was it remarked about a lawyer or what?

A. It was strictly a remark about a lawyer.

Q. What was the remark?

A. He said, "Maybe I should talk to a lawyer."

Q. And at that point, did the questioning cease?

A. Yes.

[310] Q. Did you do anything to clarify?

A. Yes. Made it very clear that we're not here to violate his rights, that if he wants a lawyer, then we will stop any kind of questioning with him, that we weren't going to pursue the matter unless we have it clarified is he asking for a lawyer or is he just making a comment about a lawyer, and he said, No, I'm not asking for a lawyer," and then he continued on, and said, "No, I don't want a lawyer," and then he said he didn't kill the guy and he said that he was the type of person that if he did kill the guy, he'd have to tell someone about it.

Q. So, as you were clarifying whether or not he wanted a lawyer, the accused specifically said that he did not, correct?

A. Correct.

Q. And then he went on and he initiated further conversation beyond that?

A. Yes, he did.

Q. Did you do a background check on Seaman Apprentice Davis as far as his criminal record?

A. Yes, we did.

Q. Did that reveal anything as far as a record?

A. Yes.

Q. Something extensive or?

A. We have a few records on him, yes.

Q. Was he ever convicted of a crime?

A. Larceny.

Q. Do you know if he was sentenced to jail because of that?

A. Six months in jail, I believe.

Q. Now, at approximately 1853 when Seaman Apprentice Davis asked for a lawyer at that time, correct?

A. I beg your pardon?

Q. At approximately 1853–

A. 1857.

Q. 1857.

A. Yes.

Q. He asked for a lawyer?

A. He said, "I think I want a lawyer before I say anything else."

Q. The questioning stopped?

A. Immediately.

[311] Q. Any questioning before that?

A. Beg your pardon?

Q. Was there any–I mean after that, after he made–

A. No, absolutely not.

Q. Was that the end of the interview?

A. That was the end of the interview, and we called the ship.

Q. You'd gone over that rights advisement and the waiver form prior to this. Prior to him executing that form, prior to being advised of his rights and waiving them, was he questioned in any way prior to that?

A. No. According to what was relayed to me by Special Agent Clark, no questions were asked of him.

Q. No questions were asked while he was at NIS in the office?

A. No.

TC: The government has no further questions.

MJ: Recross, counselor?

CC: Beg the court's indulgence?

MJ: Certainly.

[Defense counsel conferred.]

CC: Your Honor, may we request that the witness obtain the original log from this interview so we can–our Xerox copy is, frankly, hard to read. Even if we can go on to something else while she is doing that or whatever.

TC: Assuming it's available, the government certainly has no objection to that.

MJ: I assume they are available, are they not?

WITNESS: Yes, sir, back in my office.

MJ: Very well, would you like to see those before you conduct any further examination?

CC: Please.

[312] MJ: Could you accommodate us, please, Special Agent.

WITNESS: Sure, no problem.

MJ: Very well, we are in recess until that can be accomplished.

The Article 39(a) session recessed at 1645, 16 March 1989.

An Article 39(a) session was called to order at 1708, 16 March 1989.

MJ: The court will come to order.

TC: The record should reflect that all persons present when the court recessed are again present.

RECROSS-EXAMINATION

Questions by the defense:

Q. Special Agent Sentell, during the break you were able to obtain and retrieve from your files the document that's the log interview/interrogation log personnel data sheet dated 4 November '88 in reference to this case, is that correct?

A. Yes, I was.

Q. Flipping to the original, if you would, please, in examining that in the manner in which you've been trained as an investigator and the background that you have, isn't it correct the time on the log sheet that was originally placed at the exercise of the suspect's rights was 1757?

A. I beg your pardon? Where he exercises his rights?

Q. Where it is circled "exercised his rights," the original time put down was 1757, isn't that correct?

A. No.

Q. What time was the original time put down there?

A. It was 6. I put down 6:57.

Q. Would you mind holding that document up to the light and looking at it.

A. [Doing as directed.] 6.

Q. That's still your testimony that it's 6?

A. Yes.

Q. Is it rather coincidental that the time break for the rest was at 1757 at the bottom?

A. No.

[313] Q. Nothing coincidental about that at all?

A. No. It just is a coincidence.

Q. Nothing coincidental about the time on the rest break being changed either?

A. No.

Q. Now, with respect to your notes, you say you clarified whether or not he wanted a lawyer at 1753, is that correct?

A. Yes.

Q. What did you do to clarify whether or not he wanted a lawyer? What did you, Agent Sentell, do or what did Mr. Clark under your direction do at 1753 to clarify that?

A. Both of us, we said, "Well, wait a minute, we're not—are you asking for a lawyer? We're not here to violate your rights in any way to a lawyer."

Q. Did you tell him he could call the legal office?

A. No, we did not tell the legal office.

Q. Did you tell him he could call a civilian attorney?

A. No.

Q. Did you stop questioning him?

A. Yes.

Q. I thought you just said you questioned him further? You and Clark asked him whether—

A. Pertaining to the case. Pertaining to the investigation. The questions we were asking were relative. "Do you want a lawyer? Are you telling us you want a lawyer?"

Q. Well, you didn't ask those questions when you terminated the interview?

A. No, because it was very definite because the way that he brought it up was "maybe, I should talk to a lawyer."

Q. Where in your notes does it indicate that he ever asked for a lawyer at the termination of the interview?

A. I did not put that in my notes. I just know that the interview was terminated when he said, "I want a lawyer," and that's exactly what when we stopped, and he made it very clear he wanted a lawyer. It wasn't a "maybe" as an offhanded comment; it was a very definite, "I want a lawyer." We didn't question him any further.

[314] Q. And you thought that when he asked you at 1753 that it was just an offhanded comment that he wanted a lawyer?

A. We clarified that.

Q. "We" being?

A. We meaning Mr. Clark and I. "Are you asking for a lawyer? Do you want a lawyer?" "No." But at the end of the interview, he said, "I want a lawyer." That's a very definite statement. We did not question,. "Are you asking for a lawyer?" or anything along those lines. It was a definite statement he provided to us.

Q. And at the end of that interrogation with him, you were satisfied that you had questioned to all the pertinent aspects of the investigation. You had completed your interrogation.

A. No, we still had further questions to go.

Q. And what were those?

A. I don't recall at the time.

Q. Well, you recall everything else about this interview. What other questions did you have at the termination of the interview regarding his input in the case?

A. I do not have any recall at this time.

Q. Certainly at 1753, you hadn't gotten all the information you wanted.

A. Or at 1857.

CC: Beg the court's indulgence.

[Defense counsel conferred.]

CC: We have no further questions of this witness, Your Honor.

MJ: Very well, may I see the documents, please.

WITNESS: This is the—did you want my notes?

MJ: I wanted the original log.

WITNESS: Oh, here you go. [Handing the documents to the military judge.]

MJ: May I see your notes, please.

[The requested document was handed to the military judge.]

MJ: Thank you.

[315] TC: Your Honor.

MJ: Sir,

TC: The notes were never entered as Appellate Exhibits. The government would just propose that marking them as the next Appellate Exhibit in order. Offering them.

MJ: What number is that, Mr. Arenberg?

REPORTER: It will be XXXIX, sir.

MJ: What's XXXVIII? The log?

REPORTER: XXXVIII is the interview log.

MJ: Very well, thank you.

WITNESS: Could I have my original?

MJ: No.

WITNESS: Okay.

MJ: Sorry.
WITNESS: Okay.
MJ: I have a thing about Xeroxed copies.
WITNESS: Okay.
MJ: I'm sorry, I'm out of phase here. The log and then the notes are?
REPORTER: The interview log is XXXVIII and the notes are XXXIX.
MJ: Thank you.

EXAMINATION BY THE COURT

Questions by the military judge:

Q. According to your log, and according to testimony, at 1753, Seaman Davis said maybe he should talk to a lawyer, and according to your notes questions stopped and the note is "clarified did he or did [316] he not want lawyer, he said, 'No.' " What do you mean by "clarified"? Could you expand on that, please, ma'am.

A. Okay. Well, Your Honor, he made it in such an offhanded comment that it was not a request, it didn't sound like a request, and we wanted to make sure that was he requesting a lawyer at that point and did he want to talk to a lawyer at that point, and it was just a matter of, well, was it made in an offhanded comment or was he saying that he wanted a lawyer, and that's why we wanted to clarify it. It was, "But listen, if you want a lawyer, we're not here to violate any of your rights; if you want a lawyer, you get a lawyer," basically, is what it boiled down to. We explained that to him.

Q. And what was his response?

A. He said no, he didn't want a lawyer because he didn't think that he needed a lawyer and that he didn't need a lawyer because he said he didn't kill the guy, and

that if he did kill the guy, he said he was the type of person that had to tell someone about it.

Q. So, the last substantive statement he made was about, I think, it is Kaiser, is that right? Here I will let you look at your notes, I wasn't trying to test you.

A. Yes.

Q. And then he indicated that at that time for some reason, he decided he did want a lawyer?

A. No, what we did was we went back over a few things that he'd already talked about in the club, about his activities and about what we'd already talked about, and it says we were asking different things about, well, if you said that—different things about the investigation but it was rehash of what was already covered in the interview.

Q. Well, then if it was a rehash, what triggered him to suddenly decide that he unequivocally wanted an attorney?

A. He said—

Q. Well, I'm not really interested in what he said but what, apparently in your mind triggered his invocation of his right to have an attorney.

A. He said, "I want a lawyer."

Q. I understand that, but what preceded the—

A. He repeated a statement that he'd said prior to that time. It was, like, I had to tell someone, and I said, "You have, and we have a sworn statement from the individual." He said, "I want a lawyer."

Q. Very well.

A. I mean it was a very definite, "I want a lawyer." I went, "No problem."

[317] MJ: Thank you, ma'am. If you would like, Mr. Arenberg, will be happy to make a copy of this for you unless you already have one.

WITNESS: I believe I've got a copy somewhere.

MJ: Very well, any questions based upon the inquiry of the military judge?

DC: No, sir.

TC: No, sir.

There being no further questions, the witness was excused and withdrew from the courtroom.

MJ: Anything further on the motion, please?

TC: Sir, as the next Appellate Exhibit in order, the government would offer the results of interview that was produced as a result of that interrogation.

MJ: Very well, that is—

REPORTER: It will be XL.

TC: The record should reflect that I'm handing what has been marked as Appellate Exhibit XL, consisting of three pages, to the military judge. The government has nothing further on this, with regard to this aspect of the motion, Your Honor.

MJ: This she got out of all those notes? All this came out of that little sheet of notes?

TC: Yes, sir.

MJ: Wow. Is this also a Xerox? I made it clear that I expect in a general court, we get originals. I'm aware of the rule, but why does Naval Investigative Service fill out these forms unless they are for admission in court-martial. Why is retention in their record more important that submission in a general court-martial, Captain?

TC: I can't answer that, sir.

MJ: Well, please, in the future I want originals if they are going to come into a court-martial.

TC: As a matter of course, it's a rare occasion when we're provided an NIS investigation that has any originals in it.

[318] MJ: Well, I expect them particularly in a general court-martial, and the poor counsel over here have been using copies that are barely discernible.

MJ: Very well, anything further, sir?

TC: No, Your Honor.

MJ: Mr. Savage.

CC: We would call Robert Davis.

MJ: Surely.

DC: Seaman Davis will be testifying for the limited purpose of the motion, sir.

MJ: Understood.

Operations Specialist Seaman Apprentice Robert Lee Davis, United States Navy, was called as a witness for the defense, was sworn and testified as follows:

DIRECT EXAMINATION

Questions by the military judge:

Q. Very well, you are the accused in this case, is that correct?

A. Yes, sir.

MJ: Very well, won't you, please, proceed.

Questions by the defense:

Q. Going right to, Mr. Davis, November 4, where were you on the 4th of November 1988?

A. I was in the Naval Hospital.

Q. How were you released from the Naval Hospital?

A. NIS people came to pick me up, three gentlemen.

Q. Were you taken out in handcuffs?

A. Yes, I was.

Q. You were restrained. You were taken to the NIS headquarters or office, whatever, however they refer to their—where Ms. Sentell works, that's where you were taken?

A. Yes, sir.

[319] Q. What was your restraint at the time you were in the NIS office?

A. I was handcuffed to a chair.

Q. Now, during the course of their questioning of you, did you ever ask for a lawyer?

A. Yes, I did.

Q. Tell the Judge when that happened, what happened in terms of your talking to Ms. Sentell or Mr. Clark and what they did with respect to you.

A. Well, they were talking to me, and I said, "Well, I'd like a lawyer," and they said, "We'll take a break," and they walked out and left me handcuffed to the chair, and an older guy came in and stood by the door watching me.

Q. When you say "an older guy," have we seen him in the courtroom today or yesterday?

A. No, we haven't.

Q. So, in addition to the NIS agents that have testified, Mr. Clark and Ms. Sentell, it's your testimony that there was another agent or party?

A. At that time, there was.

Q. Did he ever identify himself?

A. No, he didn't.

Q. And is it your testimony that Sentell and Clark, Ms. Sentell and Mr. Clark, left the room?

A. Yes, they did.

Q. And you remained in the room with the third party, an unidentified third party?

A. Yes, sir.

Q. Did they ever return?

A. Yes, sir.

Q. Is that the time then that you were taken back to the brig?

A. No, sir.

Q. What happened at that time?

A. They came back in and started questioning me again.

CC: Kindly answer any questions the prosecutor might have.

[320] **CROSS-EXAMINATION**

Questions by the prosecution:

Q. Seaman Apprentice Davis, you mentioned an older man, apparently, an NIS agent that was present at some point when you were at NIS, was he present when you were being interviewed by Special Agent Clark and Special Agent Sentell?

A. No, he wasn't.

Q. Was it just yourself along with Special Agent Clark and Special Agent Sentell?

A. Yes, sir.

Q. What about when you asked for a lawyer? Who was present then?

A. Those two.

Q. How did you ask for a lawyer? What did you say?

A. I said, "I would like a lawyer."

Q. And what happened after that?

A. They said, "We'll take a break" and walked out.

Q. What happened when they came back in?

A. They just came back in, and they gave me Copenhagen, and then they started questioning me.

Q. Did they talk to you any more about asking for a lawyer? Did they ask you any further questions about wanting a lawyer when they came back in?

A. No, they didn't.

Q. Did they handle—let me rephrase that. When you asked for a lawyer, did they just stop questioning you and walk out of the room or—?

A. They said, "We'll take a break" and walked out.

Q. Did they ask you any further questions at that time?

A. No, they didn't.

Q. So you didn't talk to them at all prior to the break? I mean between the time you mentioned a lawyer and the

time y'all took a break, you didn't say anything further to them?

A. No, I didn't

Q. And they didn't say anything except, "We'll take a break"?

A. They said, "We'll take a break" and walked out.

[321] Q. And when they came back in, nothing was mentioned about a lawyer?

A. No, sir.

Q. Did you say anything about a lawyer when they came back in?

A. No, sir.

Q. Who started speaking first when they came back in?

A. They did. They offered me Copenhagen.

Q. What about after that?

A. They just kept asking me questions.

Q. Then they started asking you questions?

A. Yes, sir.

TC: The government has no further questions, Your Honor.

MJ: Mr. Savage?

CC: [Negative response.]

EXAMINATION BY THE COURT

Questions by the military judge:

Q. Obviously, you knew you had the right to ask for a lawyer, is that correct?

A. Yes, sir.

Q. When they just left you and came back in and started talking, why didn't you pursue your desire for a lawyer?

A. I really didn't understand, you know, what was going on.

Q. Well, let me ask you, why didn't you just say, "Well, where's my lawyer? How come I'm not getting a lawyer?"

A. They didn't tell me anything, you know, about a lawyer.

Q. Now, you heard Agent Sentell testify that some time later, and I don't have the times because I gave the exhibits back to the court reporter, but at some time later, you, again, asked for a lawyer and then what happened? Is that what occurred, first of all, did you then ask for a lawyer at a later time?

A. Yes, I did.

Q. How was that any different?

A. That was basically the same way. I said, "I want a lawyer."

Q. What happened then, Seaman?

A. They stopped again.

[322] Q. Did they then come back and try and interrogate you any further?

A. They came back in the room. They asked me a couple questions, you know, then they took me and fingerprinted me.

Q. But largely, they did not question you any further?

A. No, sir.

Q. I'm sorry, I don't mean to be technical, but is your answer is they did not question you any further, is that correct?

A. Question me any further when, sir?

Q. I didn't mean to confuse you. The second time when you said I wanted a lawyer, what did they do, could you tell me, please?

A. They asked me, like, two questions and then they took me and fingerprinted me.

Q. But other than that, they didn't ask you any questions, is that correct?

A. That's correct, sir.

MJ: Very well, fine. Thank you. Any questions based upon the inquiry of the military judge?

[Negative response.]

MJ: You may return to your seat, please.

There being no further questions, the witness was excused and returned to his seat.

CC: That's all we have, Your Honor.

MJ: Very well.

TC: Based upon the testimony of the accused, Your Honor, the government would call Special Agent Clark. He's in his office.

MJ: Do you want to do that this evening or do you want to—how long will it—

TC: He's standing by, sir.

MJ: Very well, summon Mr. Clark, would you, please. How long will that take?

TC: It should be just a few minutes, sir.

MJ: Ask him to bring his notes, his original notes.

[323] TC: Yes, sir.

MJ: Very well, we will be in recess.

The Article 39(a) session recessed at 1733, 16 March 1989.

The Article 39(a) session was called to order at 1741, 16 March 1989.

MJ: The court will come to order.

TC: The record should reflect that all persons present when the court recessed are again present in court, and Special Agent Clark has resumed the witness stand.

Mr. Keith Clark, Naval Investigative Service, was recalled as a witness for the government, was reminded that he was still under oath and testified as follows:

DIRECT EXAMINATION

Questions by the prosecution:

Q. Special Agent Clark, you testified earlier concerning an interview of the accused on thee 20th of October 1988. Did you have occasion to speak with Seaman Apprentice Davis at any time after that?

A. Yes, I did.

Q. When was that?

A. The next time that I interviewed Davis was on the 4th of November and that was an interrogation.

Q. Where did that take place?

A. That took place at the NIS office in this building.

Q. Prior to that interview, had Seaman Apprentice Davis been apprehended?

A. Yes, he had.

Q. Prior to asking questions of Seaman Apprentice Davis, was he advised of his rights?

A. Yes, he was.

Q. Did he exercise any sort of waiver of those rights?

A. Yes, he did sign a waiver of rights form which was explained to him.

[324] Q. Did any questioning occur before you advised him of his rights and he waived them?

A. No, it did not.

Q. Approximately how long did the interview last?

A. The interview lasted from approximately 4:30 in the afternoon to a little after, I believe 7:00.

Q. How did the interview terminate?

A. The interview terminated by Davis requesting an attorney.

Q. At that point, did all questioning cease?

A. Yes, it did.

Q. Did you question him any further after that?

A. No, we did not.

Q. Prior to the time when you began questioning him after executing the rights form and so on, and after that and prior to 7:00 when he requested an attorney, did he request—make any sort of mention of request an attorney prior to that, prior to 7:00?

A. Yes. During the interview, Davis did make a statement or he said, "Maybe" or words to the effect, "Maybe I should get an attorney." It wasn't real clear that he was asking for an attorney at that time, and we stopped questioning to clarify that point.

Q. Do you remember that vein in which he mentioned an attorney, did he specifically say, "I want an attorney"?

A. No, it was not a direct statement that he wanted an attorney before any further questioning or he wanted an attorney present. It was kind of an offhanded comment that, like, "Oh, boy, maybe I should get a lawyer," and it wasn't a direct statement that he was asking for a lawyer. That's why we kept—

Q. What did you do when he made that remark? What, if anything, did you do?

A. Both myself and Special Agent Sentell stopped the questioning and asked him directly if he wanted an attorney present before any further questioning and clarified it to him that we could not ask any more questions if he was, in fact, asking for an attorney at that time.

Q. You took a break at some point during the interview, correct?

A. That's correct.

Q. Did you take your break when he asked for the lawyer?

A. The break occurred approximately about the same time. Whenever this came up and we tried to clarify it with him as whether or not he needed or wanted an attorney and the fact that we couldn't question him any more if in

fact he was saying he wanted an attorney. Then we [325] took a break. His response to that was that, well, no, he didn't do it and he didn't need an attorney.

Q. So, in addition to saying that he didn't need an attorney, he said other things?

A. In addition to saying that he didn't need an attorney, I do believe he stated that, "No, I didn't do it," or words to that effect. and he didn't need an attorney. But we made it very clear to him that if, in fact, he thought he needed an attorney, we would stop right there and made it very clear to him that we could not question him any further if that was, in fact, what he was requesting.

Q. After mentioning the attorney, Seaman Apprentice Davis, according to your testimony, went beyond that and carried on further conversation. Was anything additionally said? Was that in response to questions to you or was that—or did he go beyond simply saying he didn't want an attorney? Was that on his own or something he said in response to questions?

A. The fact that he didn't want an attorney or clarifying the fact that, no, he was not requesting an attorney was only in response to our asking him if, in fact, he wanted an attorney to clarify what he had just stated, was he really requesting an attorney or not. After him making that statement and he initiated further comments, we had a break right then and came back in the room.

Q. You said that Seaman Apprentice Davis made further comments?

A. Yes.

Q. Comments that were not in response to questions?

A. Yes, comments—I believe about the first comment that was made besides, "Well, no, I didn't do it," and "I don't need an attorney," he said something to the effect that if he had done it, he would have been the type that

would have to have told somebody about it, and initiated the conversation like that.

Q. Special Agent Clark, did you make any notes during the course of the interview?

A. I did make notes during the course of that interview.

Q. One other thing, with regard to the interrogation of Seaman Apprentice Davis, was there a log kept of that interrogation?

A. Yes, there was a log of the time he entered the room and various times throughout.

Q. How many logs were there? Did each of you keep a log, both you and Special Agent Sentell or was there just one kept?

A. There was just one log kept.

[326] Q. With regard to your notes, do you have those with you?

A. I do not have the notes of that interview. I have searched for them and have been unable to locate them.

Q. Have you destroyed them?

A. I have not destroyed them. I have just misplaced them. I do not know where they are right now.

TC: The government has no further questions.

MJ: Counselor.

CC: May it please the court.

CROSS-EXAMINATION

Questions by the defense:

Q. I don't know if it was today or yesterday, but I know you were on the stand before. Was that today? Yesterday?

A. That was yesterday.

Q. Yesterday in response to some questions, Mr. Clark, you were giving us procedures that you as NIS

agent follow in conjunction with Agent Sentell, and I recall—I believe I recall you saying that on some occasions you took notes and some occasions, she took notes, is that correct?

A. Yes, that's correct.

Q. Is that how you proceeded with respect to this investigation?

A. In this particular interrogation, both of us took notes.

Q. All right, so with respect to this aspect of the overall investigation, this particular interrogation was more important than other interrogations or other interviews that you had conducted. Is that a fair statement?

A. That's a fair statement. It was considered to be an important interrogation, yes.

Q. And the reason why you took notes and Agent Sentell took notes is so that it could be fully documented as to the questions and responses given by Davis who was then clearly a suspect in this case, isn't that correct?

A. It is correct. We both took notes so that if anything that I missed writing down, she would get and vice versa.

[327] Q. But the purpose of you both taking notes was to ensure the completeness and the accuracy of the information that was taken, is that correct?

A. That's correct.

Q. Why then, sir, didn't you video tape this interrogation?

A. Well, it didn't occur to us to have to video tape the interrogation. It's not a normal procedure that we follow.

Q. Do you have a tape recorder?

A. Yes, we do have a tape recorder.

Q. Do you often use tape recorders when you go out and dictate in them, reports of investigation?

A. No, we do not.

Q. What do you have the tape recorders for?

A. We don't have any NIS issued tape recorders. If I'm on a surveillance or something where I can't write down notes, I may dictate notes.

Q. You dictate notes, correct, into a tape recorder? They provide you with one. Did you do that?

A. No, they don't provide me with one. I do have one.

Q. But you do that. You, Agent Clark, have done that in other cases.

A. Yes, I have.

Q. You did it in this case.

A. I did it on one occasion in this case.

Q. Do you still have that tape?

A. Yes.

Q. Why didn't you tape record this interrogation which you say was the most important thing you did in terms of an interview in this case?

A. It's not standard NIS policy to tape interrogations or interviews.

Q. You've lost your notes or misplaced your notes?

A. At this time, I have searched for them today, I have not been able to find them.

Q. Do you remember when Captain Thompson called you back in February and directed you to preserve all your handwritten notes in this case?

A. I recall being told that I might need my notes later, and I, certainly, had not intentionally misplaced any notes.

[328] Q. That was not my question. My question is do you recall back in February, Captain Thompson directing you to preserve your handwritten notes in this case.

A. Actually, I don't recall a directive from Captain Thompson telling me to preserve them. It would be a standard policy to preserve our notes anyway.

Q. So this case wouldn't be handled any differently than any other in terms of preserving your notes?

A. That's correct.

Q. Do you recall any emphasis being placed on the importance of preserving your handwritten notes in this case?

A. Yes, there seems that there was some emphasis placed our being sure that our notes were kept. We, of course, assured—they are kept.

Q. Now, when you came back to NIS headquarters or the NIS office, the local NIS office here, that is in this building as I understand it, is that correct?

A. Yes.

Q. And you went and picked up the accused from the hospital. You did that, correct?

A. That's correct.

Q. And who was with you at that time?

A. Special Agent Watson and Special Agent Canady.

Q. And he was restrained and taken back to your office.

A. That's correct.

Q. In the office, his restraints were—was he unleashed or unrestrained?

A. Okay, he was unhandcuffed and then rehandcuffed to a chair.

Q. So, he was restrained in the office?

A. Yes, he was.

Q. Did the other agents who were involved in the transportation of Mr. Davis then leave the building or leave the office where he was being interviewed?

A. There were other agents in the office.

Q. In the office?

A. In the office, not in room that we were in but in the office.

Q. The room that you were in when you interviewed Mr. Davis, you, Agent Sentell and Mr. Davis were in the room.

A. That's correct.

[329] Q. During the course of your debriefing or interview or interrogation of Mr. Davis, did you ever leave the room?

A. Yes, I did.

Q. During the course of your interview of Mr. Davis, did Ms. Sentell leave the room?

A. This was during the breaks, yes.

Q. Now, would you repeat that, please.

A. I'm sorry. It was not during the course of our actual interviewing, it was during a break.

Q. Did you say break, singular, or break, plural?

A. Well, it should be break singular.

Q. Did the both of you leave the room?

A. Not at the same time or we never left Davis unattended.

Q. Was there ever any third person there? Was there an older gentlemen?

A. Yes, I believe the special agent in charge was in the office. Mr. O'Connor, our assistant special agent in charge was in the office and may have stood by while I and Agent Sentell separated or during the break.

Q. During the break, didn't you and Agent Sentell go out in the hall and discuss tactics, procedures, questions that you were then going to ask him? I mean, during the break didn't you both leave the room and go out and discuss what you were doing and what you were going to do?

A. Yes, I believe we did.

Q. When you came back in, you asked him if he wanted to smoke a cigarette or have a Coca Cola?

A. Yes, we asked him, I know, if he wanted a drink and asked him if he smoked. I don't believe he smokes.

Q. What did he do? Did you give him anything to chew or perhaps, something to snuff?

A. Yeah, I do believe—you've refreshed my memory there. I do believe that he wanted a dip of snuff.

Q. When you came back in from the break, did you readvise him of his rights?

A. We didn't readvise him of his same rights, however, we did advise him that the same rights applied.

[330] Q. Well, in the log sheet—now, I understand you didn't keep the log, is that correct?

A. That's correct.

Q. Were there any errors on the log sheet that you recall?

A. There were some corrections on the times as they were written down.

Q. Any other errors other than times?

A. Other than the times, I don't recall.

Q. On section 13, it says interrogation breaks, include stop/start times and rewarning if necessary. What do they mean "rewarning if necessary"? What does that mean?

A. That would mean if there was an exceptionally long period of time between the start and stop such as ending from one day and picking up the next day or if, for some reason, it seemed that there should be an additional warning.

Q. Well, clearly, Mr. Clark, we have established and we can agree that immediately prior to the break, Mr. Davis requested an attorney. Can we agree to that?

A. Prior to the break?

Q. Yes, sir.

A. He had mentioned it and we had clarified whether or not he actually was asking for an attorney.

Q. And then you took a break.

A. That's correct.

Q. And the break – during the break you left the room with Ms. Sentell. You were gone about 10 minutes and you came back in and you continued your interview with him.

A. Yes, the interview continued after we returned to the room.

Q. Never asked him to resign or reaffirm his waiver of his 31's?

A. No, we didn't.

Q. As soon as he came back in the room, or, excuse me, as soon as you and Ms. Sentell came back in the room, the first line of questioning of Mr. Davis was or his first responses to you were, "He didn't kill anybody and if he killed somebody he'd have to tell somebody," isn't that correct?

A. I believe that happened before the break.

Q. Before the break?

A. Yes.

[331] Q. Well, didn't you just testify in response to Captain Thompson's questions that it happened right after the break, and I'm not trying to confuse you, if you need to look at your notes or whatever.

A. I'm trying to get that straight. During the time that we were clarifying his comment.

Q. When you say "we" now who are you talking about?

A. Special Agent Sentell and myself. She made it very clear to him that we couldn't continue questioning if he was, in fact, asking for an attorney, and I made it extremely clear to him that I could not initiate any further questions and did not intend to unless he, in fact, was not asking for an attorney and needed to know if, in fact, he needed or wanted an attorney at that time, and, specifically, when we left, okay, and it was right after the clarification of that, we took a break, and I know that the next

comment that was made, and I believe that that was right at the end of that clarification and just before the break that he said that he didn't need an attorney and that he didn't kill the guy and that if he had, he'd have to tell somebody.

Q. And that's a clear recollection of yours. I mean, there's no hidden agenda there, that's what happened, correct?

A. To the best of my memory serving, yes, that is what happened.

Q. Now, when you – as you say, "we" and when I use your term "we," that is Sentell and Clark.

A. Right, in this situation, that's Sentell and myself.

Q. Clarification. During the clarification process of whether or not Davis wanted a lawyer, did you tell him that he had the right to remain silent and that if he continued to make statements that they would be used against him?

A. No, I don't believe I reiterated that.

Q. Did you tell him that he had a right at that time to consult with a lawyer and that the United States Navy would provide him with a lawyer right at that moment?

A. No, I didn't use those words.

Q. Did you tell him that he had a right to call up a civilian lawyer provided he'd pay for it, and he could consult with that lawyer at that time?

A. No, I didn't do that.

Q. And that is what I'm talking about in terms of the clarification, none of those questions were asked to clarify whether or not he wanted a lawyer.

A. None of those specifically.

CC: We have no further questions of this witness, Your Honor.

[332] **REDIRECT EXAMINATION**

Questions by the prosecution:

Q. Once again, Special Agent Clark, when the subject of a lawyer, one way or another, came up the first time, did Seaman Davis specifically request a lawyer?

A. No, he did not specifically request a lawyer.

Q. Now you said that when he did that, you didn't go through all the rights once again. Did he indicate any misunderstanding or lack of understanding of the rights you'd earlier advised?

A. No, he seemed very clear about them.

Q. Did he have any—when he finally ascertained those rights later on in the interview, did he seem to have any hesitation or doubt about doing so?

A. No, and there was doubt in my mind that he was requesting an attorney at that time and the interview ended right then.

Q. After he had mentioned a lawyer, are you certain that you clarified that?

A. There's no doubt in my mind that that was made exceptionally clear.

Q. Was Seaman Apprentice Davis unequivocal in his statements that he didn't want or need a lawyer?

A. Yes, it was very plain that he did not wish to request a lawyer at that time.

Q. Special Agent Sentell's notes indicate that he asked for a lawyer about 1753. The interrogation log indicates that you went on a rest break about 1757. Do those times—does that sound accurate?

A. That sounds accurate. It would take approximately five minutes or so, the time spent in there before we could take a break.

Q. So there were a few minutes that transpired between the time he mentioned lawyer and the time you left

the room on a break?

A. Yes, it did.

Q. And it was during that period of time that you clarified the lawyer?

A. Yes, it was.

Q. It was during that time that he initiated further conversation?

A. Yes, it is.

TC: The government has no further questions.

[333] MJ: Recross, sir?

CC: We have no questions.

EXAMINATION BY THE COURT

Questions by the military judge:

Q. During the break, where was the accused located, sir?

A. He was seated in a chair.

Q. So, he didn't leave the interrogation room?

A. I don't believe he did at that time. There was one time, I believe, that he used the bathroom.

Q. Is there a head attached?

A. There are several bathrooms, and there was one just across the hall.

Q. So he had to be uncuffed and—?

A. Yes.

Q. Did you have to escort him into the head or what's the procedure?

A. The procedure there is that he was handcuffed or rehandcuffed in front of his body so he could still be cuffed and use the bathroom without any real problem, and I stood by the door while he was using the bathroom.

Q. So these bathrooms are individual private heads?

A. Yes.

Q. Because you are in a section that used to be the hospital?

A. That's correct.

MJ: Thank you. I have no other questions. Any other questions of the agent, please?

DC: No, thank you, sir.

There being no further questions, the witness was excused and withdrew from the courtroom.

TC: The government has nothing further, Your Honor.

CC: We have nothing further, Your Honor.

* * * * *

[341] MJ: Very well, while the military judge shares Mr. Savage's reservations as to the standard Naval Investigative Service waiver of rights form, and I would note in that regard the more straightforward form prescribed by the Judge Advocate General in his Section 0175 of [342] his Manual, I think that pursuant to Military Rule of Evidence 304 that the accused was properly advised of his rights pursuant to Article 31 and the cases of *Miranda* and *Tempia,* and that he intelligently and freely waived those rights. Moreover, I find the mention of a lawyer by the accused during the course of the interrogation to have been not in the form of a request for counsel and that the agents properly determined that the accused was not indicating a desire for or invoking his right to counsel.

MJ: The motion to suppress the 4 November '88 statement is accordingly denied.

MJ: Very well, there were other portions to that motion, correct?

TC: No, sir, that was all we planned to cover with regard to that motion. There were some statements that were referred to with regard to the hospital. The government would propose covering those as a part of motion 11.

EDITOR'S NOTE

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APPELLATE EXHIBIT XXVIII 165

U.S. NAVAL INVESTIGATIVE SERVICE

TITLE: S/DAVIS, ROBERT LEE/OSSN USN
CCN: 030CT88-06CS-0582-7HNA

INVESTIGATIVE ACTION: RESULTS OF INTERVIEW

ON 20OCT88, ROBERT LEE DAVIS, OSSN USN, 302-60-5400, WAS INTERVIEWED ONBOARD THE USS MAHAN (DDG-42) BY REPORTING AGENT AND SPECIAL AGENT JEANMARIE V. SENTELL CONCERNING HIS KNOWLEDGE OF KEITH SCOTT SHACKELTON (DECEASED), AND ANY OTHER INDIVIDUALS PRESENT AT THE ENLISTED CLUB ON 020CT88.

DAVIS STATED HE WAS AT THE ENLISTED CLUB, LOCATED ON NAVAL STATION CHARLESTON, ON THE FIRST SUNDAY IN OCTOBER, PAYDAY WEEKEND, 020CT88. DAVIS WAS SHOOTING POOL AT THE CLUB AND STAYED UNTIL CLOSING. DAVIS STATED HE ONLY SHOOTS POOL FOR MONEY AND HE DOES NOT PLAY POOL MUCH AT THE ENLISTED CLUB. DAVIS LEFT THE ENLISTED CLUB ON 020CT88 AND BELIEVED HE WENT BACK TO THE SHIP (USS MAHAN) WHERE HE CALLED HIS GIRLFRIEND "BERT" (ALBERTHA LYNN HEFFNER) AND STORED HIS POOL STICKS. DAVIS THEN STATED HE TOOK A CAB TO JW'S, A LOCAL NIGHT CLUB, WHERE HE MET WITH BERT. DAVIS AND BERT STAYED AT JW'S UNTIL CLOSING AND THEN THEY DROVE IN BERT'S CAR TO HER HOUSE LOCATED IN MEN-RIV HOUSING, GOOSE CREEK, SC. DAVIS STATED HE REMEMBERED WEARING JEAN TYPE PANTS WHICH HAD SIX POCKETS, TWO POCKETS ON THE LOWER LEG SECTION, AND A LIGHT BLUE SHIRT.

DAVIS WAS SHOWN A COMPUTERIZED PHOTOGRAPH OF SHACKELTON AND ASKED IF HE RECOGNIZED THE PERSON IN THE PICTURE. DAVIS STATED HE RECOGNIZED THE INDIVIDUAL IN THE PHOTO BUT DID NOT KNOW HIS NAME AND BELIEVED HE SHOT POOL WITH HIM.

DAVIS SATED HE SPENDS ABOUT $40.00 TO $50.00 PER NIGHT WHEN HE GOES OUT. DAVIS EXPLAINED HE GETS HIS MONEY FROM PLAYING POOL AND THAT HE MAKES ABOUT $900.00 PER PAY DAY FROM SLUSHING (COLLECTING FROM USURY LOANS). DAVIS ALSO SAID HE OWES JOE MULL SOME MONEY FROM SLUSHING BECAUSE PEOPLE WHO DO NOT WANT TO BORROW MONEY FROM MULL WILL BORROW FROM HIM AND HE GETS THE MONEY FROM MULL.

DAVIS SAID HE FIRST HEARD ABOUT SHACKELTON'S DEATH ABOUT THREE DAYS AFTER IT HAPPENED. WADE (WADE BIELBY) AND BONNIE (BONNIE KRUSEN) TOLD HIM THAT SHACKELTON WAS BEATEN WITH A POOL STICK. DAVIS SAID HE OWNS TWO POOL STICKS, ONE IS A MC DERMIT AND THE OTHER IS A DAVID HOWARD. WHEN ASKED IF HE WOULD ALLOW NIS TO EXAMINE HIS POOL STICKS HE SAID HE WOULD BUT THAT HE COULD NOT GET THEM AT THAT TIME BECAUSE THEY WERE IN BERT'S CAR AT HER HOUSE.

DAVIS WAS THEN TAKEN TO THE RESIDENCE OF ALBERTHA LYNN HEFFNER WHERE HE RECOVERED HIS POOL STICKS FROM HEFFNER'S VEHICLE. SPECIAL AGENT SENTELL CONTACTED ALBERTHA HEFFNER WHO WAS AT HOME AND ADVISED HER THAT DAVIS WAS GETTING HIS POOL STICKS FROM HER VEHICLE AND HEFFNER HAD NO OBJECTIONS.

APPELLATE EXHIBIT XXVII

DAVIS TURNED OVER TO REPORTING AGENT ONE GREY POOL CASE CONTAINING TWO POOL STICKS. DAVIS THEN VOLUNTEERED INFORMATION THAT THERE WAS A SPOT ON THE OUTSIDE OF HIS POOL CASE WHICH MIGHT BE A BLOOD STAIN AND THAT IT WAS HIS BLOOD. DAVIS SAID HE DID NOT KNOW HOW THE SPOT GOT THERE AND THAT IT MIGHT NOT BE BLOOD AT ALL BUT KETCHUP WHICH HE MAY HAVE SPILLED ON HIS CASE.

BIOGRAPHICAL DATA
NAME: ROBERT LEE DAVIS
EMPLOYMENT: US NAVY
DUTY STATION: USS MAHAN (DDG-42)
SSN: 302-60-5400
DOB: 10JAN67
POB: COLUMBUS, OH

REPORTING AGENT: KEITH V. CLARK
OFFICE: NISRA CHARLESTON, SC
DATE PREPARED: 20OCT88
DATE TYPED: 22NOV88

U.S. NAVAL INVESTIGATIVE SERVICE

TITLE: S/DAVIS, ROBERT LEE/OSSN USN
CCN: 03OCT88-06CS-0582-7HNA

INVESTIGATIVE ACTION: RESULTS OF INQUIRIES/INTERVIEWS ABOARD THE USS MAHAN

ON 19OCT88, AN ATTEMPT TO LOCATE SUBJECT ABOARD THE USS MAHAN DISCLOSED THAT HE WAS UA. ON 20OCT88, ICS JOHN T. KRAFFT, CHIEF MASTER AT ARMS CONTACTED REPORTING AGENT TO ADVISE THAT SUBJECT RETURNED. UPON ARRIVAL, LCDR ROBERT MAYDOSZ, EXECUTIVE OFFICER, LTJG THOMAS R. MOSS, SUBJECT'S DIVISION OFFFICER AND ICS KRAFFT ADVISED REPORTING AGENT AND SPECIAL AGENT KEITH V. CLARK THAT SUBJECT MADE SOME REMARKS THAT MADE THEM QUESTION HIS MENTAL STABILITY AND THAT THEY WERE SENDING HIM TO THE MEDICAL OFFICER FOR A PSYCHOLOGICAL EVALUATION. THEY ALSO STATED THAT OS2 GUIDRY HAD SOME INFORMATION THAT MAY BE PERTINENT TO THE INVESTIGATION OF THE DEATH OF THE SAILOR. SUBJECT'S SERVICE RECORD WAS PROVIDED ALONG WITH THE DIVISION OFFICERS COUNSELING RECORDS. ON 25OCT88, WHEN SUBJECT'S SERVICE RECORD WAS RETURNED, CRD WILLIAM E. DOUD, THE COMMANDING OFFICER OF THE MAHAN ADVISED THE MEDICAL OFFICER'S REPORT ON SUBJECT INDICATED SUBJECT HAD AN EXTREME PERSONALITY DISORDER. THE MEDICAL OFFICER REPORTEDLY RECOMMENDED AN EXTENSIVE PSYCHOLOGICAL EVALUATION ON SUBJECT AT THE PSYCHIATRIC DEPARTMENT OF THE NAVAL HOSPITAL. THE FOLLOWING INFORMATION WAS OBTAINED FROM PERSONNEL ABOARD THE USS MAHAN (DDG-42) ON THE DATES INDICATED.

20OCT88, OS3 DAVID LLOYD GUIDRY, USN, 437-17-3736, ADVISED THAT PRIOR TO 06 OCT 88, SUBJECT TOLD HIM THAT VICTIM WAS KILLED WHEN HE WAS HIT AND JABBED WITH A POOL STICK.

20OCT88, FC2 MARLOWE GENE SMITH, USN, 266-55-8407, DUTY MASTER AT ARMS, STATED HE WAS SITTING WITH SUBJECT WHILE REPORTING AGENT AND SPECIAL AGENT KEITH CLARK WERE INTERVIEWING OS3 GUIDRY. SMITH ADVISED SUBJECT WAS EXTREMELY NERVOUS AND TALKATIVE, SUBJECT INFORMED SMITH THAT HE DIDN'T KILL VICTIM, BUT HE KNEW WHO DID AND HE WASN'T GOING TO TELL ANYONE UNLESS IT LOOKS LIKE HE WAS GOING TO GET BLAMED FOR THE DEATH. SUBJECT ALSO TOLD SMITH THE PERSON THAT KILLED VICTIM KNEW MARTIAL ARTS AND DROVE A WHITE PICK-UP TRUCK.

08NOV88, HMC DOUGLAS C. MURRAY, USN, MEDICAL OFFICER, PROVIDED A LIST OF BLOOD TYPES FOR ALL PERSONNEL ASSIGNED TO THE USS MAHAN. HMC MURRAY ALSO REVIEWED HIS RECORDS OF INDIVIDUAL WHO REPORTED TO SICK CALL FOR INJURIES DURING THE THREE DAYS FOLLOWING VICTIM'S DEATH: MSSN LIVINGSTON WAS THE ONLY PERSON WHO SUSTAINED AN INJURY CONSISTENT WITH AN ALTERCATION.

08NOV88, A LIST OF THE PERSONNEL WHO WERE UA ON 03 OCT 88 WAS OBTAINED: FN SIMPSON (EXTENDED PERIOD OF TIME, PRIOR TO AND AFTER 03OCT88); OSSN TORRIELLO; OSSN DAVIS; MSSA HULING (1 HOUR AND 15 MINUTES)

TITLE: S/DAVIS, ROBERT LEE/OSSN USN
CCN: 030CT88-06CS-0582-7HNA

09NOV88, OSSR CIRO (NMN) TORRIELLO, USN 107-70-3737, ADVISED HE WAS NOT AWARE HE WAS SUPPOSED TO BE ON DUTY , HE WAS AT THE SIESTA HOTEL ON RIVERS AVE., CHARLESTON, SC WITH DS VERNON. TORRIELLO STATED HE WAS UA ON A SATURDAY, NOT A MONDAY.

09NOV88, MSSN CLAYTON LENARD LIVINGSTON, USN, 244-39-6706, STATED HE SUSTAINED THE INJURIES TO HIS ARM WHEN HE CLIMBED OVER A FENCE NEAR HIS APARTMENT COMPLEX.

09NOV88, OSSN MICHAEL DOYLE VANHOOSE, USN, 293-68-4364, STATED HE HAS KNOWN SUBJECT SINCE DEC87; HE ADVISED HE WAS NOT AT THE EM CLUB ON 020CT88; HE SAID SUBJECT IS ADDICTED TO LYING AND HE HAS NO TROUBLE BELIEVING SUBJECT KILLED SOMEONE, HE ADDED THAT IF HE DID KILL THE GUY, IT WAS PROBABLY OVER MONEY. VANHOOSE STATED THAT SUBJECT CHANGES PERSONALITIES, HE'LL ACT LIKE THE KARATE KID FOR A FEW DAYS, THEN HE'LL CARRY HIS POOL STICKS AROUND THE WORK SPACES AND CHASE PEOPLE AROUND LIKE HE WOULD HIT THEM. VANHOOSE SAID DAVIS IS A POOL HUSTLER, HE LIKES TO PLAY POOL FOR MONEY AND SUBJECT DOES NOT APPEAR TO HAVE ANY RESPECT FOR MONEY OR HIS PROPERTY, LIKE HIS POOL STICKS. HE AMPLIFIED HIS STATEMENT BY SAYING THAT SUBJECT WILL TAKE CARE OF HIS POOL STICKS ONE DAY, THEN THROW HIS $300.00 POOL STICK ON THE GROUND WHEN HE GETS ANGRY. HE ADDED THAT HE THOUGHT SUBJECT SEEMED TO BE LOW ON CASH THIS PAST MONTH.

09NOV88, SN ROBERT (NMN) VEGA, USN, 050-66-8963, REVIEWED THE PLAN OF THE DAY FOR THE WEEKEND OF 010CT88, HE WAS ON DUTY SATURDAY AND SUNDAY, 010CT88 AND 020CT88, DUTY ENDED AT 0700 MONDAY, 030CT88. HE STATED HE HAS BEEN TO JW'S WITH SUBJECT, HE THOUGHT IT WAS THE WEEKEND AFTER HE HAD DUTY.

09NOV88, HM3 FLEETWOOD PRICE, USN, 259-39-4358, STATED HE EXAMINED MSSN LIVINGSTON'S INJURIES ON 050CT88, HE ESTIMATED THE INJURY WAS OBTAINED WITHIN 16 HOURS OF RECEIVING TREATMENT.

09NOV88, MM3 KEVIN MARCELLUS HENRY, USN, 532-80-7704, COULD NOT PROVIDE ANY PERTINENT INFORMATION.

09NOV88, SN JEFFERY LAWRENCE DAIGLE, USN, 222-40-3597, STATED HE WAS WITH HIS GIRLFRIEND, CAROL CORNEILLE, ON 020CT88 AND DIDN'T GO TO THE EM CLUB. DAIGLE DENIED KNOWLEDGE OF VICTIM'S DEATH UNTIL WADE BIELBY TOLD HIM HIS CONFISCATED HIS POOL STICK. HE ADVISED HE PLAYS POOL WITH SUBJECT AND BIELBY AT THE EM CLUB OR THE BOWLING ALLEY.

10NOV88, GMM1 JAMES EDWARD COOK, USN, 018-52-5801, DENIED GOING TO THE CLUB ON 020CT88, HE SAID HE STARTED A TRAINING SCHOOL ON 03 OCT 88 AND NEEDED TO BE ALERT/RESTED SO HE DID NOT GO OUT. HE ADVISED WHEN HE INITIALLY HEARD ABOUT THE DEATH, HE "GAFFED" IT OFF BECAUSE HE THOUGHT IT WAS A RUMOR. COOK ADVISED SUBJECT'S ATTITUDE CAN CHANGE VERY QUICKLY FROM NICE TO ANGRY, HE ALSO

TITLE: S/DAVIS, ROBERT LEE/OSSN USN
CCN: 030CT88-06CS-0582-7HNA

PROVIDED NAMES OF SEVERAL OF SUBJECT'S FRIENDS.

10NOV88, SK2 LARRY DARNELL HENRY, USN, 068-46-8889, STATED HE DOES NOT LIVE ON THE SHIP AND WHAT HE KNOWS OF SUBJECT IS "HE'S A PAIN IN THE ASS".

PARTICIPATING AGENT
KEITH V. CLARK, SPECIAL AGENT, NISRA CHARLESTON, SC

REPORTING AGENT: JEANMARIE V. SENTELL
OFFICE: NISRA CHARLESTON, SC
DATE PREPARED: 04DEC88
DATE TYPED: 04DEC88

MILITARY SUSP[illegible] ACKNOWLEDGEMENT AND W[illegible] OF RIGHTS

Place: NISRA CHARLESTON, SC

CHARLESTON, SC

I, ROBERT LEE DAVIS

have been advised by Special Agent(s) JEANMARIE V. SENTELL AND KEITH V. CLARK

that I am suspected of THE HOMICIDE OF KEITH SCOTT SHACKELTON

I have also been advised that:

(1) I have the right to remain silent and make no statement at all;
(2) Any statement I do make can be used against me in a trial by court-martial or other judicial or administrative proceeding;
(3) I have the right to consult with a lawyer prior to any questioning. This lawyer may be a civilian lawyer retained by me at no cost to the United States, a military lawyer appointed to act as my counsel at no cost to me, or both;
(4) I have the right to have my retained civilian lawyer and/or appointed military lawyer present during this interview; and
(5) I may terminate this interview at any time, for any reason.

I understand my rights as related to me and as set forth above. With that understanding, I have decided that I do not desire to remain silent, consult with a retained or appointed lawyer, or have a lawyer present at this time. I make this decision freely and voluntarily. No threats or promises have been made to me.

Signature: Robert Lee Davis

Date & Time: 1634 04 Nov 88

Witnessed: Jeanmarie Sentell

Keith V. Clark Special Agent NISRA

Date & Time:

At this time, I, _____ desire to make the following voluntary statement. This statement is made with an understanding of my rights as set forth above. It is made with no threats or promises having been extended to me.

APPELLATE EXHIBIT XXXVII

NISFORM 001 REV 4-81

NAVAL INVESTIGATIVE SERVICE
Investigative Notes

TITLE: ____

CCN: ____

MADE BY: [signature] | MADE AT: OGCS | DATE: 4 [illegible]

Orig notes

Davis
denied homicide

was @ enlisted club c̄ Bert
danced
brought pool sticks to EM club
day / may not have played pool

was @ Bowling Alley before EM

Davis said he
"leads a boring life"
Sunday-Everyday off is same gets up
≈ 10-11 AM eat plays pool @
Bowl. Alley goes to EM Club, closes club
goes to JW's

10/2-10/3 went to Bert's after JW's
was late - to tired / hung over -
may have been at club c̄ friends -
can't remember 1 mo ago, but

(1)

NISFORM 021/04-81

Investigative Notes

TITLE:

CCN:

MADE BY:	MADE AT:	DATE:	TIME:
WS	DGCS	4 Nov	

if he wasn't c̄ Bert he
might have been @ club c̄
Phil Bivins
Vega
Mike Van Hoose - Big/B/M

denied winning $30 from victim

does not get upset if someone doesn't
pay him if he wins $ from them

re: T-Shirt - Winston teeth removed
Tuesday (25 Oct) teeth/gums draining
had towels c̄ blood - threw them out
gagged on gauze - threw out, blood
should still be on pillow + bed sheets
T-Shirt was under his mouth let it
dry before putting it in his coffin
locker.

②

NISFORM C71/5-81

[redacted] SERVICE
Investigative Notes

TITLE:

CCN:

MADE BY:	MADE AT:	DATE:	TIME:
[signature]	O6CS	11/8	

no one has his locker combo, except ~ 3 wks ago (James) Beck saw him opening his locker & showed him he could open the lock now - does not think Beck would open the lock

1753 - said maybe he should talk to a lawyer - questions stopped - clarified did he or did he not want lawyer said "no"

brought up Dave Guidry - said he was having a conversation c Guidry & he said I was hit by a good one because Buddy told him. he likes to know everything or make people think he knew everything.

NISFORM 071/04-81

NAVAL INVESTIGATIVE SERVICE

Investigative Notes

TITLE: _____

CCN: _____

MADE BY:	MADE AT:	DATE:	TIME:
QLS	OGCS	11/4	

He added the ips ee: pool stick to Guidry

then he changed statement + said Billy told him.

He said he thought he knew who did it - Jeff Guidry - because he didnt go to the club for ots after I billy - was doing acid that night + was afraid he did something he might not remember -

NISFORM 0271/54-51

APPELLATE EXHIBIT XL

175

U.S. NAVAL INVESTIGATIVE SERVICE

TITLE: B/DAVIS, ROBERT LEE/OSSN USN
CCN: 88OCT88-0808-0582-7HMA

INVESTIGATIVE ACTION: RESULTS OF INTERVIEW WITH R.L. DAVIS

ON 04NOV88, OSSN ROBERT LEE DAVIS, USN, 302-60-5400, WAS INTERVIEWED BY REPORTING AGENT AND SPECIAL AGENT KEITH V. CLARK AT NISRA CHARLESTON, SC. DAVIS, HEREIN AFTER REFERRED TO AS SUBJECT, WAS INFORMED THAT HE WAS SUSPECTED OF THE HOMICIDE OF KEITH S. SHACKELTON AND WAS READ THE ATTACHED MILITARY SUSPECT'S ACKNOWLEDGEMENT AND WAIVER OF RIGHTS, EXHIBIT (1) PERTAINS. SUBJECT WAS ASKED IF HE UNDERSTOOD HIS RIGHTS AS THEY WERE READ TO HIM, HE REPLIED 'YES', HE WAS THEN ASKED IF HE WISHED TO CONSULT WITH A LAWYER PRIOR TO ANY QUESTIONING, HE REPLIED 'NO'. SUBJECT WAS PROVIDED EXHIBIT (1) AND ASKED TO READ THE FORM AND TOLD TO POINT OUT ANY PART THAT HE MAY HAVE A QUESTION ABOUT OR A WORD THAT HE DID NOT UNDERSTAND. UPON COMPLETION OF SUBJECT READING THE FORM, SUBJECT WAS ASKED IF HE HAD ANY QUESTIONS ABOUT HIS RIGHTS OR THE FORM, HE SAID 'NO'. SUBJECT WAS ASKED IF HE WOULD ANSWER SOME QUESTIONS ABOUT THE ALLEGATIONS, HE SAID YES BECAUSE HE DIDN'T KILL 'THE GUY' AND SIGNED THE WAIVER OF RIGHTS.

SUBJECT WAS ASKED TO RELAY HIS ACTIVITIES ON SUNDAY 02OCT88. HE WAS GIVEN A REFERENCE POINT, 01OCT88, THE SATURDAY PAYDAY BECAUSE OF THE END OF THE FISCAL YEAR. SUBJECT STATED HE LEADS A BORING LIFE AND DOES THE SAME THING EVERY SATURDAY OR SUNDAY HE IS OFF DUTY. HE STATED HE GETS UP AROUND 10 OR 11 AM, EATS, PLAYS POOL AT THE BOWLING ALLEY, GOES TO THE EM CLUB WHEN IT OPENS, LEAVES THE CLUB WHEN IT CLOSES AND GOES TO JW'S (A BAR THAT IS LOCATED OFF-BASE). SUBJECT THEN STATED HE WAS AT THE EM CLUB ON 02OCT88 WITH BERT (ALBERTHA HEFFNER). THEY DANCED, HE MAY OR MAYNOT HAVE PLAYED POOL, BUT HE STATED HE ALWAYS HAS HIS POOL STICKS WITH HIM. HE THEN STATED HE AND BERT WENT TO JW'S AND THEN HE WENT TO BERT'S HOUSE. SUBJECT DID NOT HAVE ANY IDEA WHAT TIME HE ARRIVED AT BERT'S HOUSE, 'IT WAS LATE', HE SAID HE WAS LATE FOR WORK THE NEXT DAY BECAUSE HE WAS TIRED AND HUNG OVER. BERT BROUGHT HIM BACK TO THE SHIP AT ABOUT 1PM OR 2PM ON 03OCT88. SUBJECT CONFIRMED BERT LIVES IN MENRIV GOVERNMENT HOUSING, IN GOOSE CREEK, SC. HE WAS ASKED WHY HE TOLD HIS DIVISION OFFICER HE WENT TO COLUMBIA THE PREVIOUS NIGHT. SUBJECT STATED HE DIDN'T WANT TO GET INTO ANYMORE TROUBLE BY BEING WITH A MARRIED WOMAN, SO HE MADE UP THE STORY ABOUT GOING TO COLUMBIA. SUBJECT WAS INFORMED THAT BERT STATED SHE WAS NOT AT THE CLUB THAT SUNDAY NIGHT BECAUSE SHE WAS LOW ON FUNDS AND COULDN'T PAY FOR THE BABYSITTER. SUBJECT THEN STATED HE WAS AT THE CLUB WITH SOME FRIENDS. HE WASN'T SURE BECAUSE IT WAS A MONTH AGO. THEN HE STATED IF HE WASN'T AT THE CLUB WITH BERT, HE WAS AT THE CLUB WITH PHIL BEVINS, VEGA, AND MIKE VANHOOS. WHEN ASKED, HE EXPLAINED PHIL BEVINS IS OFF ONE OF THE SHIPS IN CHARLESTON, HE COULDN'T REMEMBER THE NAME OF THE SHIP, HE SAID VANHOOS AND VEGA ARE ASSIGNED TO THE USS MAHAN.

SUBJECT WAS CONFRONTED WITH THE REPORT THAT HE STATED HE WON $30.00 FROM SHACKELTON PLAYING POOL ON THE NIGHT HE WAS KILLED. SUBJECT DENIED PLAYING POOL WITH SHACKELTON AND HE DENIED WINNING $30.00 FROM HIM. WHEN ASKED HOW HE FEELS WHEN SOMEONE DOES NOT PAY HIM AFTER HE WINS A GAME, HE STATED HE DOESN'T GET UPSET, HE JUST 'CHALKS IT UP' AND FORGETS ABOUT IT.

U.S. NAVAL INVESTIGATIVE SERVICE

TITLE: DAVIS, ROBERT LEE/OSEN USN
CON: 01CCTB8-0408-0B81-7HNA

SUBJECT WAS ASKED ABOUT THE BLOODY TEE SHIRT IN HIS COFFIN LOCKER. SUBJECT STATED HE HAD HIS WISDOM TEETH REMOVED ON TUESDAY 25OCT88, AND THEY WERE DRAINING. HE SAID THE DENTIST PUT GAUZE IN THE HOLES, BUT HE GAGGED ON THEM WHEN HE WAS SLEEPING, SO HE PUT TOWELS UNDER HIS HEAD WHEN HE LAYED DOWN. WHEN THEY BECAME FULL OF BLOOD, HE THREW THEM AWAY AND GOT THE TEE SHIRT OUT. HE STATED HIS PILLOW CASE AND BED SHEETS PROBABLY HAVE BLOOD ON THEM TOO BECAUSE HE HASN'T HAD TIME TO HAVE THEM WASHED. HE STATED HE HUNG THE TEE SHIRT OVER THE PIPE ABOVE HIS RACK UNTIL IT DRIED, THEN HE PUT IT IN HIS LOCKER. WHEN ASKED HOW SOMEONE ELSE'S BLOOD COULD GET ON THE TEE SHIRT, HE SAID HE HAD NO IDEA. WHEN ASKED IF ANYONE ELSE HAS ACCESS TO HIS LOCKER, HE SAID NO, HOWEVER ONE DAY ABOUT THREE WEEKS AGO, JAMES BECK SAW HIM OPENING HIS LOCKER AND SHOWED HIM HE COULD OPEN THE LOCK NOW. SUBJECT STATED THAT BECK WAS JUST PLAYING AROUND AND HE DID NOT THINK BECK WOULD EVER GO INTO HIS LOCKER FOR ANY REASON.

AT 1743, SUBJECT MADE A COMMENT THAT MAYBE HE SHOULD TALK TO A LAWYER. ALL QUESTIONING STOPPED, SUBJECT WAS ASKED IF HE WAS REQUESTING A LAWYER. HE SAID NO. SUBJECT WAS INFORMED THAT THERE WAS NO WAY WE WERE GOING TO VIOLATE HIS RIGHT TO A LAWYER, IF HE WANTED ONE. HE SAID HE DID NOT WANT A LAWYER AT THAT TIME. SUBJECT ADDED THAT HE DIDN'T NEED A LAWYER BECAUSE HE DIDN'T KILL THE GUY, AND IF HE DID KILL THE GUY, HE WAS THE TYPE OF PERSON THAT HAD TO TELL SOMEONE.

SUBJECT THEN BROUGHT UP A CONVERSATION HE HAD WITH DAVE GUIDRY, A NAVY PETTY OFFICER ASSIGNED TO THE USS MAHAN. SUBJECT SAID HE WAS HAVING A CONVERSATION WITH GUIDRY AND HE TOLD GUIDRY THAT THE GUY THAT GOT KILLED BEHIND THE COMMISSARY WAS KILLED WITH A POOL STICK. WHEN ASKED WHY HE SAID THAT HE SAID HE LIKED TO MESS WITH PEOPLE AND MAKE THEM THINK HE KNEW MORE THAN THEM. WHEN ASKED WHY HE SAID THE GUY WAS HIT AND JABBED WITH A POOL STICK, HE SAID JUST TO MAKE IT SEEM MORE REALISTIC. HE ADDED THAT HE HEARD THE GUY WAS KILLED AND DECIDED TO ADD THE INFORMATION. WHEN HE FINISHED THE SENTENCE, HE CHANGED HIS STATEMENT AND SAID (WADE) BIELBY TOLD HIM THE DETAILS ABOUT THE POOL STICK.

SUBJECT THEN ADDED THAT HE THOUGHT HE KNEW WHO DID KILL 'THE GUY'. HE SAID 'JEFF KAISER'. HE CONTINUED BY SAYING THAT KAISER DIDN'T GO TO THE CLUB FOR ALMOST A MONTH AFTER THE KILLING BECAUSE HE WAS SCARED, HE WAS SCARED BECAUSE HE WAS 'DOING ACID' THAT NIGHT AND HE WAS AFRAID HE DID SOMETHING HE MIGHT NOT REMEMBER. SUBJECT AGAIN STATED HE DID NOT KILL 'THE GUY' BECAUSE IF HE HAD, HE WOULD HAVE HAD TO TELL SOMEONE. WHEN SUBJECT WAS TOLD THAT HE DID TELL SOMEONE AND THAT PERSON HAS COME FORWARD AND PROVIDED A SWORN STATEMENT TO US ABOUT THE KILLING, SUBJECT STATED HE WANTED A LAWYER BEFORE HE SAID ANYTHING ELSE.

EXHIBIT
(1) SUBJECT'S WAIVER OF RIGHTS (UNSIGNED)

U.S. NAVAL INVESTIGATIVE SERVICE

TITLE: S/DAVIS, ROBERT LEE/OSSN USN
DCN: 130CT88-0613-0582-7HNA

REPORTING AGENT: JEANMARIE V. SENTELL
OFFICE: NISRA CHARLESTON, SC
DATE PREPARED: 04NOV88
DATE TYPED: 04NOV88

600-104

HEALTH RECORD — CHRONOLOGICAL RECORD OF MEDICAL CARE

DATE	SYMPTOMS, DIAGNOSIS, TREATMENT, TREATING ORGANIZATION (Sign each entry)
v - JUL 1988	USNH—NWS BRANCH CLINIC CHARLESTON, SC 29408 — EXAMINED THIS DATE IN ACCORDANCE WITH ARTICLE 15 MANMEDDEPT AND FOUND TO BE PHYSICALLY QUALIFIED FOR TRANSFER.
	Michael Curry HM3
	M CURRY, 24831688
21 Oct 88	Squadron MO – NP Eval
	Asked to see this 21 y/o WM c̄ 1½ yrs AD service for NP eval. Since joining the Navy, he has consistently been in trouble → at every command/school/training that he has been at, he has repeatedly gone to mast for various offenses (UA, damaging govt property, disrespect, etc.). He was also in trouble c̄ the law prior to coming into Navy but would not give specifics during interview. He dropped out of High School ~ 3 wks before graduation because he was "tired of it" although claims he would have passed → went to FLA for 1 month c̄ girlfriend at that time. Eventually went back to hometown in Ohio + got GED prior to enlistment. Moved out of home when father died (he was 17) + into own apt; he apparently had a very poor relationship c̄ parents + family.
	He has been under suspicion for a # of offenses, including stealing money + supplies aboard ship, but nothing ever proven. He is currently being investigated by NIS as a suspect in recent murder that occurred on base, although he denies involvement.
	Service record not available for my review as NIS has it.
	(Cont') [signature]

PATIENT'S IDENTIFICATION (Use this space for Mechanical Imprint)

RECORDS MAINTAINED AT:			
PATIENT'S NAME (Last, First, Middle initial): Davis, Robert Lee			SEX: Male
RELATIONSHIP TO SPONSOR: —	STATUS: USN		RANK/GRADE: OSSA
SPONSOR'S NAME: —		ORGANIZATION: USS Manatee	
DEPART./SERVICE: DOD	SSN/IDENTIFICATION NO.: 302-60-5400		DATE OF BIRTH: 10/12/6[illegible]

CHRONOLOGICAL RECORD OF MEDICAL CARE — STANDARD FORM 600 — APPELLATE EXHIBIT XXVI

Operations Specialist Second Class Ronald S. Mull, U.S. Navy, was called as a witness for the prosecution, was sworn, and testified as follows:

DIRECT EXAMINATION

Questions by the prosecution:

Q. Please state your rank and full name.

A. I'm an OS2, E-5, Ronald Scott Mull.

Q. OS2 Mull, what is your unit?

A. USS Mahan.

Q. Do you know the accused in this case?

A. Yes, sir, I do.

Q. If he's in the courtroom today, would you point to him and state his name?

A. [Pointing towards accused.] Robert Lee Davis.

Q. Petty Officer Mull, how do you happen to know the accused?

A. He was assigned to OI Division on board the same ship I'm on, the USS Mahan.

Q. About long have you been assigned to the Mahan, OS2 Mull?

A. Approximately a year and a half.

Q. And were you—you were assigned to the Mahan in October of 1988?

A. I was assigned to the Mahan, yes, sir.

Q. What about the accused? Was he aboard the Mahan in October of 1988?

A. Yes, sir, he was.

[746] Q. Do you work in the same division as the accused?

A. Yes, sir.

Q. What's your relationship to him?

A. We were very close friends.

Q. Directing your attention to late October of 1988. Did you have occasion to speak with the accused?

A. Yes, sir, I did.

Q. And do you remember the circumstances of that?

A. Yes, sir, I do.

Q. About when was this discussion?

A. Thursday, the 27th of October.

Q. And where did this discussion take place?

A. It was down in the berthing area on board the Mahan.

Q. Go ahead and describe the circumstances, how you happened to be there.

A. All right. I had been out on liberty earlier that night and I was returning to the ship. I was walking through the passageway and I saw Davis in the passageway, he was also returning from liberty. And we just started talking in the passageway. We just walked on down toward berthing and we got down to berthing we kept talking. At first it was small talk. Then the investigation came up. I don't really remember who brought it up.

Q. What investigation are you speaking of?

A. NIS had been coming to the Ship, talking to Davis.

Q. Do you know what the investigation was about?

A. It was kind of general knowledge, you know, that it was about the guy that had got killed over behind the commissary.

Q. Do you know if they talked to Seaman Davis?

A. Yes, sir, I do. I knew that they had talked to him.

Q. NIS?

A. Yes, sir.

Q. What happened after the topic of the investigation came up?

A. Well, I asked him what he really had to do with the investigation and he said they were investigating him for the murder of this guy. And then I asked him straight out did he—did he kill the guy and he looked at me and said, "Yes, I did." You know, it kind of really shocked me at first. I was—I was expecting a no answer from him, you know, him being a very close friend of mine. And then I [747] asked him, you know, kind of what happened and he went on to tell me exactly what happened that night.

Q. What did he tell you in that regard?

A. He told me he was at the EM Club on base and he had been playing pool with a guy and he said he beat the guy out of $30.00 playing pool and the guy didn't want to pay him the money and they got into some kind of an argument about it and the guy made a smart remark to him or something of that nature. And he said—he wasn't really clear about how they got together outside the club, but later on that night somehow they—they got together outside the club and started fighting. He said that he hit the guy with a pool—his pool stick a couple of times and he said he thought he put one of the guy's eyes out; said it was messed up pretty bad. He said—I don't know exactly where he was at, but he said he drug the guy's body behind the commissary and then he said he ran down into the woods and left the base somehow. I don't know exactly how he left the base, on foot or what. He said he went to a girlfriend's house. And he said at this girlfriend's house he burned his clothes in a fireplace. He changed his clothes over there at his girlfriend's house. He apparently had been seeing her for some time; he had some extra clothes over there. And he said something about he had—he had an alibi that night though, and he wasn't really worried

about it. He said he was seen with (I don't know if it was the same girl) some girl at the club. A lot of people had seen him there at the club with some girl. Said he had an alibi.

Q. Did he say anything about leaving the club?

A. I can't really remember whether he said he left with someone or not.

Q. Do you remember if he said anything about anyone seeing him leave the club?

A. I can't really remember.

Q. What about his pool cues? Did he mention anything about them?

A. Yes. He said that NIS had his—had taken his pool cues and he said there was some stains on them and he said that they had some—that one pool cue had a stain on it. He said he tried to wash—said it had blood on it, said he tried to wash it off and sand it off, but he said there was one stain he couldn't get off and NIS was like testing the blood on the stick. He said he wasn't worried about it because the guy had the same blood type that he did. I don't know how he knew that, but that's what he said.

Q. Did you make a statement concerning your conversation with Seaman Davis?

A. Yes, sir, I did.

EXHIBIT 3

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TITLE: MIS/DAVIS, ROBERT LEE/OSSN USN
CCN: 03OCT88-06CS-0582-7HNA

INVESTIGATIVE ACTION: INTERVIEW OF JESSICA S. WHITE

ON 11DEC88, JESSICA S. WHITE WAS INTERVIEWED AT HER RESIDENCE, 631 ROBINSON RD, WOOSTER, OHIO, BY REPORTING AGENT AND PARTICIPATING AGENT MCGRANAGHAN. MISS WHITE'S MOTHER, PATRICIA A. WHITE WAS AT THE RESIDENCE AND PRESENT DURING PORTIONS OF THE INTERVIEW. UPON INTERVIEW, MISS WHITE STATED THAT SHE AND SUBJECT DAVIS HAD DATED FROM APPROXIMATELY 15 JUN 86, UNTIL SUBJECT ENTERED THE USN.

MISS WHITE STATED SHE HAD NEVER BEEN IN A SERIOUS AUTOMOBILE ACCIDENT. SHE FURTHER STATED THAT THE ONLY ACCIDENT SHE HAD EVER BEEN IN WAS A MINOR ACCIDENT, DURING WHICH HER MOTHER WAS DRIVING.

REGARDING SUBJECT ALLEGEDLY KILLING SOMEONE, WITH A PAIR OF NUN-CHUCKS, MISS WHITE STATED THAT SUBJECT OWNED A PAIR OF NUN-CHUCKS BUT SHE HAD NO KNOWLEDGE OF HIM KILLING OR ASSAULTING ANYONE WITH THE NUN-CHUCKS.

MISS WHITE CONFIRMED THAT SUBJECT DID NOT OWN OR HAVE ACCESS TO A VEHICLE, WHILE SHE KNEW HIM.

MISS WHITE STATED SHE HAD NEVER BEEN RAPED. HOWEVER, SHE RELATED THAT ONE EVENING IN 1986, WHILE SHE WAS DATING SUBJECT, SHE HAD GONE TO THE HOME OF HER FORMER GIRLFRIEND, JILL GREENWALD. JILL'S PARENTS WEREN'T HOME AND JILL'S BOYFRIEND "TROY" WAS AT JILL'S HOUSE, WITH HIS FRIEND. MISS WHITE COULD NOT RECALL THE NAME OF TROY'S FRIEND BUT, DESCRIBED HIM AS APPROXIMATELY 35 YEARS OLD. MISS WHITE STATED THAT JILL AND TROY HAD LEFT, TO GET SOME BEER, LEAVING HER ALONE WITH TROY'S MALE FRIEND. MISS WHITE STATED THAT TROY'S MALE FRIEND DID NOT RAPE HER BUT, HE UNSUCCESSFULLY TRIED TO SEXUALLY FORCE HIMSELF ON HER. MISS WHITE ADVISED SHE HAD TOLD SUBJECT ABOUT THE INCIDENT AND HE LATER INFORMED HER THAT HE "BEAT THE GUY UP" BUT, SHE NEVER SAW ANYTHING ABOUT IT IN THE LOCAL NEWSPAPER. MISS WHITE STATED SHE DID NOT RECALL TROY'S LAST NAME AND HAD NOT HAD CONTACT WITH HIM FOR OVER A YEAR. SHE NOTED SHE HAD HEARD THAT TROY MAY NOW BE HOMOSEXUAL. SHE FURTHER STATED THAT JILL GREENWALD HAD MOVED AND THEY NO LONGER MAINTAINED CONTACT. SHE AGREED TO ATTEMPT TO OBTAIN AN ADDRESS OR TELEPHONE NUMBER FOR GREENWALD. ON 13 DEC 88, MISS WHITE STATED SHE BELIEVED THE GREENWALDS WERE STILL IN THE WOOSTER AREA, WITH AN UNLISTED TELEPHONE NUMBER. SHE HAD NOT BEEN ABLE TO OBTAIN THEIR LOCAL ADDRESS.

MISS WHITE ADVISED SHE HAD NOT HEARD FROM SUBJECT FOR APPROXIMATELY A YEAR.

MISS WHITE IDENTIFIED PAUL HESS, JASON HOUCHINS AND BOB ALEXANDER AS FORMER FRIENDS OF SUBJECTS.

REPORTING AGENT: CHARLES D. RENO
OFFICE: NISRA CLEVELAND, OHIO
DATE TYPED: 21DEC88

EXHIBIT 3

FIGHTS HE HAD BEEN IN. ADDITIONALLY, MR ZIMMERMAN RECALLED THAT DAVIS FREQUENTLY WOULD MAKE THREATENING COMMENTS SUCH AS "I'LL GET HIM THIS WEEKEND." MR ZIMMERMAN STATED THAT DAVIS WAS A VERY ENERGETIC BOY WITH 'SO MUCH ENERGY HE DID NOT KNOW WHAT TO DO WITH HIMSELF'. HOWEVER, WHEN DAVIS DID WORK HARD AT PRACTICE, SO THAT HE WAS TIRED, HE (DAVIS) WOULD BECOME CALMER AND BETTER BEHAVED. MR ZIMMERMAN CATEGORIZED DAVIS AS BEING ORNERY AND ILL TEMPERED. CONCERNING DAVIS' WORK HABITS, MR ZIMMERMAN STATED THAT HE WOULD DO WHAT HE NEEDED TO TO GET A "D".

MRS DIANE MCCARTNEY, ENGLISH TEACHER AT WEST HOLMES HIGH SCHOOL, RECALLED DAVIS AS A STUDENT. MRS MCCARTNEY STATED THAT DAVIS WAS ONE OF THE ONES YOU DON'T FORGET. "HE MADE ME FEEL UNCOMFORTABLE (AFRAID)." MRS MCCARTNEY RECALLED ONE INCIDENT WHICH SHE STATED WAS RATHER TYPICAL OF DAVIS' BEHAVIOR; DAVIS USED A BALL POINT PEN TO STAB HIS HAND/FINGERS SO HE WAS BLEEDING. THEN DRIPPED HIS BLOOD ON TO HIS DESK UNTIL THE ENTIRE DESK WAS COVERED. MRS MCCARTNEY RECALLED THAT SHE AND DAVIS' OTHER TEACHERS WERE INSTRUCTED BY THE SCHOOL ADMINISTRATION NOT TO LET DAVIS OUT OF CLASS ALONE. THE OTHER STUDENTS PICKED ON HIM BECAUSE OF THE UNUSUAL THINGS HE WOULD DO, MRS MCCARTNEY STATED AND OPINED THAT DAVIS DID MANY THINGS JUST TO GET ATTENTION. WHEN DAVIS TRANSFERRED TO WOOSTER HIGH SCHOOL, MRS MCCARTNEY STATED THE ENTIRE WEST HOLMES STAFF WAS RELIEVED AND JOKED ABOUT CALLING THEIR WOOSTER COUNTERPARTS TO WARN THEM ABOUT DAVIS. MRS MCCARTNEY STATED SHE HEARD MANY STORIES ABOUT DAVIS, ONE SHE RECALLED WAS THAT HE HAD SHOT HIMSELF IN THE FOOT IN THE PARKING LOT OF A MALT SHOP IN FRONT OF A GROUP OF OTHER STUDENTS. ALSO, MRS MCCARTNEY RECALLED THAT DAVIS' SISTER, RHONDA, WAS AFRAID OF HIM, BUT MRS MCCARTNEY STATED THAT THIS WAS ONLY SOMETHING THAT SHE HAD HEARD AND THAT SHE HAD NO FIRST HAND KNOWLEDGE OF THE SISTER'S FEELINGS.

REPORTING AGENT: LUKE MCGRANAGHAN
OFFICE: NISRA CLEVELAND, OHIO
DATE TYPED: 20DEC88

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EXHIBIT 1

WEST HOLMES HIGH SCHOOL
Route 1
Millersburg, Ohio 44654

NOTICE OF INTENDED SUSPENSION

Bob Davis
Name of Student

May 23, 1985
Date

You are hereby advised that it is my intention to suspend you from school and/or school activities. The reason(s) for this intended suspension are as follows: Throwing Airplane in Study Hall. Carry Skool And Knife. Threatening To bring dynamite To WestHolmes H.S. Suspended May 24 To June 3, 1985

You will have the opportunity for an informal hearing before me to challenge the reason(s) for the suspension or otherwise explain your actions.

Jack Van Reath
Signature of School Official

I hereby acknowledge receipt of this notice of intended suspension.

Bob Davis
Signature of Student

I understand the reasons for my suspension.

Bob Davis
Signature of Student

[1565] Q. What's your position here at the Naval Station?

A. Chaplain. [LCDR James A. Julius]

Q. What is your educational background, sir?

A. Well, I'm a graduate – I have a bachelor's degree in Scholastic Philosophy from Cardinal Glennon College. I have a graduate degree in Theology from Kenwick Seminary. I attended St. Louis University. I have a Master's Degree from the University of Notre Dame.

Q. Chaplain, how much contact have you had with Seaman Davis?

A. I have seen Seaman Davis about four to five times a week since he has been incarcerated.

Q. What type of contact have you had with him during those four to five times a week?

A. Very close.

Q. Chaplain, if you would, tell the members what you know of Bob Davis based upon your contact with him.

A. I think that Seaman Davis is impaired by way of some terrible psychological problems that started, not when he came into the Navy, but in my opinion, when he was very, very young. He is adopted. I don't know what happened before the adoption. When I was – I would best describe him by alluding to some of my own experiences.

TC: The government is going to object on the grounds of relevance and hearsay, Your Honor.

DC: I believe it is relevant to provide information regarding the accused to the members and perceptions of this young man, based upon his contact with him, four to five days a week over the last several months.

MJ: Very well. The members will understand that this is information gleaned by the chaplain during counseling with the accused. Is that a fair statement, Chaplain, that that is what you are basing your testimony on?

WITNESS: Yes, sir.

WITNESS: I think that Seaman Davis has lived in a dream world. I think very few people know him underneath the braggart type of immature coating that he puts on with everybody that he meets. It is very difficult to penetrate that. By a dream world, I mean such outlandish things that he once confided in me that he beat Michael Jordan at basketball, he knocked out Mohammed Ali, and in his time in the brig, in the cell, he confided in me that he once had sex three times in one [1566] day in the cell. This is his normal mode of operation. Very few people get underneath that. He needs great help, has needed great help for many years.

TC: Your Honor, the government is going to object on the basis of relevance. There is no issue of mental impairment or anything that was raised at trial and the government contends that none exists.

MJ: Well, the chaplain is a counselor. He is a consultant with the accused, the members may hear the testimony of the chaplain. You may proceed, please, Mr. Yandle. You will certainly have an opportunity to examine Father Julius.

Q. Chaplain, if you could complete that thought regarding the necessity for treatment.

A. He is in dire need of, and he has been dire need of medical assistance for many, many years. I'm sure you are aware of his record, or you will be. It is a shame that the young man was ever allowed to be in the United States Navy.

DC: Thank you, sir, we have no further questions at this point.

MJ: Questions, Captain or Mr. Roach, of the Commander, please?

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

No. 92-1949

In The Supreme Court of the United States

October Term, 1993

Robert L. Davis, petitioner

v.

United States of America, respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF OF PETITIONER

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Attorneys for Petitioner Robert L. Davis

QUESTION PRESENTED

When a suspect makes an ambiguous request for counsel during a custodial interrogation, must the interrogator cease questioning until the suspect is provided with counsel?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NO. 92-1949

ROBERT L. DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR PETITIONER

OPINIONS AND JUDGMENTS BELOW

The opinion of the United States Court of Military Appeals, *United States v. Davis*, 36 M.J. 337 (C.M.A. 1993), is attached to the Appendix to the Petition For A Writ of *Certiorari* at pages 1a-11a. The unpublished opinion of the United States Navy-Marine Corps Court of Military Review, *United States v. Davis*, No 89-2569 (N.M.C.M.R. Sept. 16, 1991) appears at pages 12a-15a of the Appendix to the *Certiorari* Petition.

JURISDICTION

The judgment of the Court of Military Appeals was entered on March 11, 1993. The *Certiorari* Petition was filed on June 8, 1993. This Court has jurisdiction to review the decision of the Court of Military Appeals pursuant to 28 U.S.C. § 1259(3).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the United States Constitution provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of the law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

STATEMENT OF THE CASE

Seaman Apprentice Keith Shackleton was found dead behind the commissary at Charleston Naval Base at 5:30 a.m. on October 3, 1988. Joint Appendix (J.A.) 12; Transcript (Tr.) 116. Shackleton was last seen alive playing pool at the Charleston Naval Base Enlisted Club[1] on the evening of October 2. He died of head injuries inflicted by a blunt object which, according to the trial testimony of a pathologist, could have been a pool cue. J.A. 56; Tr. 156. Naval Investigative Service ("NIS") Agents assumed responsibility for the ensuing investigation.

On October 18, 1988, NIS Special Agent Sentell interviewed two sailors who reported that Petitioner, Operations Specialist Seaman Apprentice Robert L. Davis, was in the Enlisted Club on the night of October 2 until closing. J.A. 65; Tr. 163. The Agents learned that only personally-owned pool cues could be removed from the Enlisted Club, J.A. 14; Tr. 118, and the investigation began to focus on persons who owned their own pool cues. J.A. 56; Tr. 156. The NIS Agents knew that Petitioner owned his own pool cue. J.A. 59, 60; Tr. 156, 159, 162.

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[1] As at most naval bases, the Charleston Naval Base has separate clubs for junior enlisted personnel, for chief petty officers and for officers.

On October 19, NIS Agents boarded the U.S.S. MAHAN (DDG-42), the guided missile destroyer to which Petitioner was attached. The NIS Agents intended to interview him, but he was then an unauthorized absentee. J.A. 43; Tr. 141.[2] On October 20, the NIS Agents were informed that Petitioner had returned, and they came back to the ship. The command informed the NIS Agents that Petitioner had been ordered to submit to a psychiatric evaluation, which would commence on October 21, because of concerns about his "mental stability." J.A. 102; Tr. 197, 207-08, 215-16, 220. These concerns stemmed from Petitioner's statements to his Division Officer regarding his "wanting to shoot somebody" and "[b]etter yet, a police officer or a cop of [*sic*] something like that because I know he would kill me." J.A. 19, 24, 67; Tr. 122, 126, 165, 207, 215-16, 220, 222, 223; Appellate Exhibit (App. Ex.) 33.[3] Petitioner's command considered him a suspect in the Shackleton murder investigation, and the NIS Agents knew this. J.A. 48-49; Tr. 146. NIS Agent Clark, however, testified that he considered Petitioner's statements about shooting someone and killing a police officer irrelevant because "we were not looking at a victim of a shooting." J.A. 35; Tr. 135.

The NIS Agents also obtained Petitioner's service records, J.A. 103; Tr. 198, which reflected that Petitioner was an unauthorized absentee on the morning after the murder. J.A. 23, 104; Tr. 125, 207, 215-16. One of the NIS Agents admitted that any unauthorized absentee would have been a target of the investigation. J.A. 107; Tr. 201. In addition, prior to interrogating Petitioner, the NIS Agents were directed to a Petty Officer Guidry, who worked with Petitioner, because Guidry had information that was pertinent to the investigation. J.A. 102; Tr. 197. According to Guidry, Peti-

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[2] Unauthorized absence ("UA"), also referred to as absence without leave ("AWOL"), is a crime under Article 86 of the Uniform Code of Military Justice ("UCMJ"). 10 U.S.C. § 886.

[3] There is nothing in the record to suggest that Petitioner even owned a gun, much less shot anyone.

tioner had stated that Shackleton had been "beaten up and stuck with a pool cue." J.A. 20, 21, 43, 45, 56, 58, 70-71; Tr. 269-79; 123, 124, 141, 143, 155, 157, 167-68, 236. Since the cause of Shackleton's death was not common knowledge, J.A. 23; Tr. 125, NIS Agents regarded this statement as "intimate information regarding the manner of death." J.A. 26, 59; Tr. 127, 158.

On October 20, Petitioner was restricted[4] to his ship because of his prior unauthorized absence. J.A. 16; Tr. 119. Petitioner was escorted to the Admiral's Stateroom,[5] J.A. 13, 66; Tr. 117, 163, aboard the MAHAN by Petty Officer Smith, a Master-At-Arms.[6] J.A. 27, 67; Tr. 128, 164. Smith told the NIS Agents that Petitioner had stated "that he didn't kill [Shackleton], but he knew who did and he wasn't going to tell unless it look[ed] like he was going to get blamed for the death." J.A. 67, 68; Tr. 164, 165. Although this statement suggested that Petitioner feared that he might be "blamed" for the murder, the NIS Agents still gave no warnings to Petitioner nor did they pursue these comments.

By this point, the NIS Agents knew that Petitioner had been in the Enlisted Club on the night of the murder, had played pool, and

[4] "Restriction" is an authorized military punishment generally imposed for minor disciplinary infractions. In this case, it was initially used in lieu of pretrial confinement pending disciplinary action for his recent unauthorized absence. Here, this meant that Petitioner could not leave the ship.

[5] This was a particularly intimidating setting for an "interview" of a low ranking enlisted man such as Petitioner. From the perspective of a young sailor, it would have further reinforced the authority of the NIS Agents, who must have been working closely with the ship's command to have use of the Admiral's Stateroom for this interrogation.

[6] A Master-At-Arms is the naval equivalent of a military policeman. Petitioner was in custody because a reasonable sailor would not have felt free to leave while being escorted in this manner. *See United States v. Scott*, 22 M.J. 297, 302 (C.M.A. 1986). *See also United States v. Tempia*, 16 C.M.A. 629, 636, 37 C.M.R. 249, 256 (C.M.A. 1967) ("It ignores the realities of that situation to say that one ordered to appear for interrogation has not been significantly deprived of his freedom of actions.").

was one of only four people in the Club that night who owned his own pool cue. The Agents further knew that Petitioner had been an unauthorized absentee on the morning after the murder, and had made statements generally about killing and also about the specific manner of Shackleton's death. Notwithstanding all of this information, the NIS Agents informed the command that Petitioner was only "a possible witness," J.A. 42; Tr. 141, and Petitioner was not advised of his *Miranda* or Article 31(b) rights.[7] J.A. 13; Tr. 117.

During the course of the thirty minute investigative "interview" in the Admiral's stateroom, Petitioner admitted that he was at the Club on the evening of October 2 and that he believed he had played pool that evening with Shackleton. J.A. 165; App. Ex. XXVI. Petitioner also said that he "had heard that the guy was beaten with a pool stick from Bonnie and Wade—Bonnie Krusen and Wade Bielby." J.A. 68; Tr. 165. *See also* J.A. 38, 68, 78; Tr. 137, 165, 173. Petitioner admitted that he owned two pool cues, which he retrieved from his girlfriend's car at the request of the NIS Agents, who arranged to escort him off the ship to his girlfriend's house,[8] (special arrangements were made with the ship's commanding officer to allow the NIS Agents to escort Petitioner off the ship). J.A. 16; Tr. 119.

When one of the NIS Agents requested that Petitioner relinquish the pool cues, Petitioner pointed to a spot on the pool cue case

[7] Article 31(b), UCMJ, 10 U.S.C. § 831(b), requires that warnings be given to persons who are either in custody or who should reasonably be suspected of a crime when questioned in a manner likely to elicit an incriminating response. Article 31(b), however, does not include any reference to the Fifth Amendment right to counsel, and Petitioner does not seek any relief in this Court on the basis of Article 31(b).

[8] During the course of the entire investigation, the NIS Agents would retrieve pool cues from only four sailors: Jeff Kraiser, Bonnie Krusen, Wade Bielby and Petitioner. J.A. 37; Tr. 136. One of the cue sticks from the other sailors had been retrieved prior to the October 20 interview of Petitioner. J.A. 39, 79-81; Tr. 138, 174-176.

and said it was probably catsup, but that it might also be his blood. J.A. 166; Tr. 796; App. Ex. XXVI. Although the investigation had been proceeding for more than two weeks, Petitioner was only the second sailor whose pool cues the NIS Agents had retrieved, and his was the only pool cue case with a red spot that looked like blood.[9]

On November 1, NIS Agents interviewed a Petty Officer Mull, who worked in the same division aboard the MAHAN as Petitioner. Mull reported that Petitioner supposedly confessed to the murder:

> [Petitioner] said he beat the guy out of $30.00 playing pool and the guy didn't want to pay him the money and they got into some kind of an argument about it. . . . And he said—he wasn't really clear about how they got together outside the club, but later on that night somehow they—they got together outside the club and started fighting. He said that he hit the guy with a pool—his pool stick a couple of time and he said he thought he put one of the guy's eyes out; said it was messed up pretty bad. . . . I don't know exactly how he left the base, on foot or what. He said he went to a girlfriend's house. And he said at this girlfriend's house he burned his clothes in a fireplace.

J.A. 181; Tr. 747.[10] Mull reported that Petitioner had said he had an alibi. J.A. 181; Tr. 747. Mull further claimed that Petitioner

[9] The government was unable to show at trial that the blood found on the pool cue case matched the victim's blood. Tr. 906. Indeed, the government found no blood on the inside of the pool cue case or on the pool cues themselves. Tr. 905-906. Spots of blood were found on Petitioner's tennis shoes and trousers. There was "a tiny red spot" on the right shoe which proved to be blood but there was an insufficient quantity to determine the type. Tr. 911. There was also a "small reddish-brown spot" on Petitioner's jeans which proved to be blood type O, the victim's blood type.

[10] The government's evidence at trial disproved several of the "facts" contained in Mull's statement and to which he later testified. *See infra* at 43.

said he had tried to remove blood from his pool cues, but was unconcerned because he and Shackleton had the same blood type. J.A. 182; Tr. 747. The NIS Agents claimed that they finally began to consider Petitioner a suspect only after hearing Mull's report. J.A. 50; Tr. 147.

On November 4, NIS Agents arrested Petitioner at the Naval Hospital, where he had been held essentially incommunicado in the psychiatric ward since October 28th. Tr. 282. Ironically, it was the husband of the lead NIS Agent, Doctor Sentell, who, as Petitioner's attending physician, had directed that no visitors be allowed to see Petitioner unless first screened by him. App. Ex. LXI.[11] After they handcuffed him at the psychiatric ward, the Agents escorted Petitioner to the NIS office where he was handcuffed to a chair for the duration of the interrogation. J.A. 145; Tr. 319. This time, the NIS Agents elected to advise Petitioner of his Article 31(b) rights and of his *Miranda* rights. Petitioner signed a form acknowledging this advice. J.A. 151; Tr. 323.

At the beginning of the interrogation, the Agents asked Petitioner simply to relate his activities on the night of October 2; Petitioner stated that he had been out that night with his girlfriend, and admitted that he might have played pool at the Enlisted Club. J.A. 175; App. Ex. XL.

The NIS Agents then began to ask Petitioner a series of questions which suggested that his account was inconsistent with statements from other persons. For example, the NIS Agents told Petitioner that his girlfriend had denied being at the Enlisted Club on October 2. Petitioner responded that he must have confused the nights because the events in question had occurred over a month earlier. J.A. 175; App. Ex. XL. The NIS Agents also inquired why Petitioner had told his Division Officer that he had spent the night in Columbia, South Carolina, and not with his girlfriend; Petitioner answered that he did not want to get into trouble for being involved with a married woman. J.A. 175; App. Ex. XL.

[11] Although he had been evaluated as non-homicidal and non-suicidal, Petitioner was considered a murder suspect, was placed under constant watch, and was kept in red pajamas so that he would be visible if he tried to escape. App. Ex. LXI, at p. 3.

The NIS Agents then began to ask questions which implied that Petitioner had murdered Shackleton. They confronted Petitioner with a report that he had won $30 from Shackleton in a game of pool; Petitioner denied this. The Agents then asked how Petitioner would feel if someone who owed him money in a pool game refused to pay. J.A. 175; App. Ex. XL. Petitioner responded that he would not get upset and would forget about it. Finally, the Agents asked Petitioner about the presence of a bloody T-shirt in his locker; Petitioner explained that the blood was the result of the extraction of his wisdom teeth.[12] J.A. 176; App. Ex. XL.

At this point, according to Agent Sentell, Petitioner—who had been kept handcuffed to the chair throughout the entire interrogation—said "[m]aybe I should talk to a lawyer." J.A. 135, 140, 152, 176; Tr. 309, 313, 324, App. Ex. XL.[13] The NIS Agents immediately stopped questioning Petitioner about the murder.

They did not, however, cease questioning him altogether. Instead, when asked if they did anything to "clarify" Petitioner's request, Agent Sentell testified:

> [We] made it very clear that we're not here to violate his rights, that if he wants a lawyer, then we will stop any kind of questioning with him, that we weren't going to pursue the matter unless we have it clarified is he asking for a lawyer or is he just making a comment about a lawyer, and he said, "No, I don't want a lawyer. . . ."

[12] The extraction was confirmed by Petitioner's dentist, Tr. 1260, and dental records, Defense Ex. K. Forensic testing confirmed that Petitioner's blood, type B, and not Shackleton's, type O, was on the shirt. Tr. 1260-61.

[13] Petitioner testified at the suppression hearing to a different sequence of events:

> Well, they were talking to me, and I said "Well, I'd like a lawyer," and they said "we'll take a break," and they walked out and left me handcuffed too the chair, and the older guy came in and stood by the door watching me.

J.A. 146; Tr. 319. Petitioner also testified that, after a short break, "[t]hey came back in and started questioning me again." J.A. 146; Tr. 319.

J.A. 136; Tr. 310.

The NIS Agents took a short break after interrogating Petitioner about his statement regarding a lawyer. J.A. 128-129; Tr. 303-304. Returning to the interrogation room, they gave Petitioner, still handcuffed, a cursory reminder of his rights. They did not repeat the advice in full or seek to have him sign a new form. J.A. 130; Tr. 304-305.

The NIS Agents then asked Petitioner about a number of statements he had made to other persons concerning the murder. The NIS Agents asked Petitioner why he had told Petty Officer Guidry that the man who died behind the commissary had been struck with a pool cue; Petitioner responded that he liked to "mess" with people and make them think that he knew more than he actually did. Tr. 961.[14] When the Agents also asked why Petitioner had said that Shackleton had been "hit and jabbed," Petitioner answered that the added detail made his story sound more realistic. J.A. 176; App. Ex. XL. Petitioner also stated that Petty Officer Bielby had told him the details about the pool cue. In fact, Bielby had admitted this when interviewed by the NIS Agents on October 11. Tr. 242.

Approximately an hour after the initial request for counsel, Petitioner told the NIS Agents that, if he had killed Shackleton, he would have had to tell someone about it. J.A. 176; App. Ex. XL; Tr. 961. When the NIS Agents confronted Petitioner by stating that he *had* told someone, Petitioner immediately said "I think I want a lawyer before I say anything else." J.A. 129; Tr. 304; App. Ex. XL. In contrast to the "ambiguous" statement "[m]aybe I should talk to a lawyer" made an hour earlier, when he said "I think I want a lawyer," the NIS Agents ceased all questioning of Peti-

[14] Other persons would later confirm that Petitioner was a chronic liar, if not delusional. When interviewed by the Agents, one sailor stated that Petitioner was "addicted to lying." J.A. 168; App. Ex. XXIX, at p. 2. Petitioner would later tell the brig chaplain that he had defeated Michael Jordan in basketball, knocked out Muhammad Ali, and had enjoyed sex (presumably with other persons) while in confinement. J.A. 187; Tr. 1555-56.

tioner.[15]

Petitioner moved to suppress the statements taken after the initial request for counsel. The trial court ruled in favor of the government finding that "the mention of a lawyer by the accused during the course of the interrogation . . . [was] not in the form of a request for counsel . . ." under *Miranda* and *United States v. Tempia*, 16 C.M.A. 629, 37 C.M.R. 249 (1967) (*Miranda* applicable to the military). J.A. 164; Tr. 341.[16]

Petitioner was charged with capital murder. The government intended to show that Petitioner had: sodomized[17] or attempted to sodomize the victim; robbed or attempted to rob the victim; and that "the murder was preceded by the intentional infliction of substantial mental and physical pain and suffering to the victim." App. Ex. IX, p. 5; Tr. 75-76. The government's theory was that Petitioner had deliberately murdered Shackleton to rob him of $30 that Shackleton lost gambling with Petitioner, although the government never explained why the murderer-robber left $200 on Shackleton's person. *See* Tr. 562.

The trial judge, however, found the evidence too speculative to permit the government to seek to prove the alleged sodomy. The jury also rejected the government's theory, acquitted Petitioner of robbery, attempted robbery, and premeditated murder, and found Petitioner guilty of unpremeditated murder in violation of Article 118(2), UCMJ 10 U.S.C. § 918. R. 1527. Petitioner was sentenced to life in prison.

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[15] The record affords no explanation of how the brief questioning and short breaks described by the Agents could have taken from 5:53 p.m., J.A. 173; App. Ex. XXVI, at p. 3, when Petitioner made his initial ambiguous request, until 6:57 p.m., J.A. 141, Tr. 314, when Petitioner's second invocation was honored. *See also* J.A. 151; Tr. 324 (indicating that the interrogation concluded at 7:00 p.m.).

[16] The military judge failed to explicitly resolve the *factual* dispute between whether Petitioner actually said "[m]aybe I should talk to a lawyer" or "'I'd like a lawyer. . . .'" *See supra* at 8, n.13.

[17] The charges regarding sodomy and attempted sodomy were based upon the fact that the victim had been found with his trousers unbuttoned and pulled below his hips. Tr. 1282.

On appeal, the Navy-Marine Corps Court of Military Review affirmed the conviction and sentence. Although expressly raised, the Navy-Marine Corps Court of Military Review did not specifically address the *Miranda* issue. On subsequent appeal pursuant to 10 U.S.C. § 867(a)(3), the Court of Military Appeals affirmed Petitioner's conviction, and held that the Agents properly clarified Petitioner's request for counsel before continuing with the interrogation. *United States v. Davis*, 36 M.J. 337 (C.M.A. 1993). Petitioner filed a timely Petition for a Writ of *Certiorari*. *Certiorari* was granted on November 1, 1993.

SUMMARY OF ARGUMENT

Interrogators must cease all questioning when a suspect in custody makes a statement that ordinary people could reasonably understand, in context, as a request for counsel. In holding that Petitioner's statement "[m]aybe I should talk to a lawyer" did not constitute a request for counsel because it was not in the form of an invocation, the lower courts improperly elevated form over substance. Petitioner's statement contained two critical components: an expression that Petitioner (1) desired to communicate with (2) an attorney. Any ambiguity created by the word "maybe" is dispelled when viewed in the context presented here: a custodial interrogation of a low ranking sailor from a combat vessel in the United States Navy who was handcuffed and interrogated following two weeks of isolation in a psychiatric ward. In these circumstances, Petitioner's statement "[m]aybe I should talk to a lawyer" was not functionally different from his later statement "I think I want a lawyer," which the NIS Agents understood as an invocation of the right to counsel.

Since ordinary persons are not expected to understand the exact nature of their rights, they cannot be expected to invoke those rights with the precision of lawyers and judges. Moreover, the inherently coercive nature of custodial interrogation requires a low threshold for a statement to qualify as a request for counsel.

Such an approach is also consistent with the settled principle that courts should give a broad, rather than a narrow, interpretation to requests for counsel. While Petitioner's statement was ambiguous if divorced from its context, it should reasonably have been understood as a request for counsel under the circumstances, and all questioning should have ceased. Further, the trial court erred in allowing the jury to consider Petitioner's post-invocation statements, which were obtained following improper efforts to "clarify" the request, as evidence that Petitioner's "confession" to Mull was reliable. *Smith v. Illinois*, 469 U.S. 91 (1984).

Even if an ambiguous request were not sufficient to trigger the rule of *Edwards v. Arizona*, 451 U.S. 477 (1981), the police should be prohibited from clarifying any ambiguity. Equivocation in a request for counsel may more often reflect a suspect's timidity in the face of the pressures of custodial interrogation than vascillation between invocation and waiver. The police should not be permitted to "clarify" any such ambiguities because the potential for abuse and overreaching is too great. The interrogators have no incentive to aid a suspect in invoking the right to counsel, nor do they represent the suspect's interests as only a lawyer can. Allowing the police to postpone providing an attorney after an ambiguous request only reinforces the coercive atmosphere that necessitated the *Miranda* and *Edwards* decisions in the first place. Any interrogation subsequent to requests for counsel—be they forthright or ambiguous—is likely to be seen by a suspect as further evidence that the police control access to counsel and may deny the request. Against this backdrop, a bright line rule prohibiting "clarification" is necessary.

A rule prohibiting police "clarification" of ambiguous requests for counsel also has the salutary effect of accommodating the individual characteristics of suspects. Where police are unaware of a suspect's susceptibility to certain suggestions, even officers more solicitous of a suspect's rights may unwittingly dissuade a suspect from invoking the right to counsel when "clarifying" the request. A bright line rule has the advantage of protecting suspects from not only deliberate but also unintentional abuse of the coercion inherent in custodial interrogation.

Even if the police were permitted to engage in a limited inquiry designed only to clarify an ambiguous request, Petitioner is still entitled to a new trial. The NIS Agents did more than merely clarify his request. The Agents used misdirection and made misleading statements. Thus, the government is unable to show that Petitioner's post-invocation statements followed a knowing and voluntary waiver. At a minimum, the interrogators' conduct here was inappropriate, and shows the continued need for the strict application of *Miranda*.

ARGUMENT

In *Miranda v. Arizona*, 384 U.S. 436 (1966), this Court held that the government may not introduce, in its case-in-chief, statements obtained from a suspect in custody unless it shows a knowing and voluntary waiver of Fifth Amendment rights following appropriate advice and warnings. *Id.* This rule was necessary given both the inherently coercive nature of custodial interrogation, and the risk that an ordinary person might otherwise be unaware of his or her Fifth Amendment rights. The Court created an irrebuttable presumption that, in the absence of proper warnings, a suspect's waiver was deemed not to be a knowing and voluntary waiver of Fifth Amendment rights. *Id.* at 468-69.

Consistent with the government's burden of proving a knowing and voluntary waiver and with the presumption against the waiver of fundamental constitutional rights, 384 U.S. at 475, the Court in *Miranda* did not require that a request for counsel be clear and unequivocal: "[i]f, however, [the suspect] *indicates in any manner and at any stage of the process* that he wishes to consult with an attorney before speaking there can be no questioning." 384 U.S. at 444-445 (emphasis added). *See also id.* at 473-74 ("[i]f the individual *indicates in any manner*, at any time, prior to or during questioning, that he wished to remain silent, the interrogation must cease.") (emphasis added); *id.* at 445 ("if the individual is alone

and *indicates in any manner* that he does not wish to be interrogated, the police may not question him."); *id.* at 500 (emphasis added) ("When at any point during an interrogation the accused seeks affirmatively or *impliedly* to invoke his rights to silence or counsel, interrogation must be foregone or postponed.") (Clark, J., concurring in part and dissenting) (emphasis added).

The use of the phrase "in any manner" reflected that the standard for determining whether a suspect has invoked the right to remain silent or the right to counsel was broad and inclusive, not requiring the use of "magic words," so that lay persons could enjoy the benefit of the right conferred by *Miranda*. 384 U.S. at 444, 473-74. Use of the word "indicates" also underscored the low threshold of clarity required to invoke the Fifth Amendment rights. *Cf. Rowland v. California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. ___, ___, 113 S. Ct. 716, 720 (1993) (use of "indicates" in Dictionary Act, 1 U.S.C. § 1, imposes less of a burden for conveying sentiment than other terms that were not used). The low standard reflected the fundamental premise of *Miranda*: the coercive nature of custodial interrogation required safeguards.

Subsequent decisions of the Court have, in *dicta*, characterized as clear and unequivocal various requests for counsel which, when viewed out of context, appear somewhat ambiguous. For example, in *Smith*, this Court held that the suspect's response "Uh, yeah. I'd like to do that" after being asked whether he understood his right to consult with a lawyer and to have one present was a clear and unequivocal request requiring interrogation to cease. 469 U.S. at 96-97. The Court went on to hold that subsequent statements could not be used to cast doubt on a suspect's initial request. *Id.* at 97-99.

Likewise, in *Edwards*, the Court held that a suspect who had stated "I want an attorney before making a deal" had "clearly asserted his right to counsel" and that it was "inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused" after the invocation of the right to

counsel. 451 U.S. at 485.[18] Although the Court in *Edwards* and *Smith* found that the statements made by the defendants in those cases were clear and unequivocal, those decisions did not change the legal standard for invocations that had originally been established in *Miranda*.

The Court has reemphasized that it is unnecessary for a suspect to choose his words with lawyer-like precision when invoking his right to counsel, for "[i]nterpretation is only required where the defendant's words, *understood as ordinary people would understand them*, are ambiguous." *Connecticut v. Barrett*, 479 U.S. 523, 529 (1987) (emphasis added). *See also McNeil v. Wisconsin*, 501 U.S. ___, ___, 111 S. Ct. 2204, 2209 (1991) (*Edwards* "requires, at a minimum, some statement that can reasonably be construed to be expression of a desire for the assistance of an attorney"); *Minnick v. Mississippi*, 498 U.S. 146, 165 (1990) (noting that "if [a suspect] should say, more tentatively, 'I do not think I should discuss this matter further without my attorney present' he can no longer be approached") (Scalia, J., dissenting).

Pending before the Court is the issue of whether a suspect undergoing custodial interrogation must express his desire to communicate with an attorney in a clear and unequivocal form to invoke his right to counsel under the Fifth Amendment.

A. Petitioner's Statement "Maybe I Should Talk To A Lawyer" Was Sufficient To Invoke The Right To Counsel.

Although ambiguous in the abstract, Petitioner's statement "[m]aybe[19] I should talk to a lawyer," when examined in the

[18] In *Edwards*, the Court recognized that a defendant's request for an attorney indicates that he does not believe that he is sufficiently capable of dealing with his adversaries singlehandedly. *Michigan v. Jackson*, 475 U.S. 625, 633 n.7 (1986). Consequently, until the defendant is in fact provided with counsel, all questioning must cease.

[19] On its face, without reference to context, the word "maybe" reflects some ambiguity. For example, the Webster's Ninth New Collegiate Dictio-

context in which the statement was made, would be understood by ordinary people as a request for counsel. Accordingly, Petitioner expressed his desire to consult with an attorney with clarity sufficient to invoke the right to counsel under *Miranda*.

1. Ordinary People Cannot Be Expected To Speak With Precision.

It is unreasonable to expect ordinary persons to speak in clear and unequivocal terms, especially in the context of a custodial interrogation. This Court has already recognized that ordinary citizens should not be expected to fully comprehend the precise nature of their constitutional rights:

> We also agree with the comments of the Michigan Supreme Court about the nature of an accused's request for counsel:
>
> > Although judges and lawyers may understand and appreciate the subtle distinctions between Fifth and Sixth Amendment rights to counsel, the average person does not. When an accused requests an attorney, either before a police officer or a magistrate, he does not know which constitutional right he is invoking; he therefore should not be expected to articulate exactly why or for what purposes he is seeking counsel.

Michigan v. Jackson, 475 U.S. 625, 633 n.7 (1986) (citation omitted). Indeed, in *Miranda*, the Court stressed the need to advise a suspect of his rights in language that ordinary citizens

nary (1991) defines the adverb "maybe" as meaning "perhaps." *Id.* at 735. The adverb "perhaps" is, in turn, defined as meaning "possibly but not certainly." *Id.* at 873. Here, the trial judge made no factual findings as to Petitioner's actual intent. For example, there is no finding that Petitioner stressed one word ('maybe I *should* talk to a lawyer') rather than another ('*maybe* I should talk to a lawyer'). Instead, the court ruled that Petitioner's statement was not, as a matter of law, an invocation.

would be able to understand: "[t]he warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent—the person most often subjected to interrogation—the knowledge that he too has a right to have counsel present." 384 U.S. at 473.

It would be unreasonable to require those same ordinary citizens who need plain language explanations to invoke these rights with the precise language of lawyers. *See Robinson v. Borg*, 918 F.2d 1387, 1393 (9th Cir. 1990), *cert. denied*, ___ U.S. ___, 112 S. Ct. 118 (1991) ("a suspect is required neither to use any magical formulation to invoke his rights nor to express his desire to obtain counsel with lawyer-like precision."). Doing so would effectively deny the right to large segments of the populace. For example, suspects not fluent in English may be unable to invoke their right to counsel. *See United States v. De La Jara*, 973 F.2d 746, 750 (9th Cir. 1992) (where suspect's request for counsel was in Spanish, "court interpreter noted that [suspect's] statement to the interrogating officer . . . could be either a question or assertion depending on inflection, and that the meaning would turn to some extent on the context"). Likewise, certain minority and ethnic groups whose speech patterns tend to avoid direct assertions or confrontations may be effectively deprived of the Fifth Amendment right to counsel if required to invoke it in clear and unequivocal terms. *See* Janet E. Ainsworth, *In A Different Register: The Pragmatics Of Powerlessness In Police Interrogation*, 103 Yale L.J. 1, 61 (1993).

Requiring a suspect to invoke the right to counsel in clear and unequivocal terms also overlooks the reality that everyday speech is imprecise. Outside of courtrooms and briefs, common speech is replete with terms used to soften the impact of direct assertions. Indeed, common language patterns often contain mollifying terms, but use of such qualifying language does not necessarily reflect equivocation on the speaker's part.[20] Even in the courtroom, a

[20] One commentator has suggested that women and some minorities are particularly conditioned to qualify their speech so as not to be perceived as

statement may appear ambiguous when viewed in isolation when it was clear in context. For example, taken out of context, the statement "[c]ould I trouble you to, please, go and obtain those notes" would likely be seen as a polite question. Once it is disclosed, however, that the statement was made by the trial judge to a law enforcement officer at the suppression hearing in this case, the statement is obviously understood, as it was even by the NIS Agents here, as an order.[21] J.A. 18; Tr. 121. In sum, context makes all the difference. Any standard that would require lay persons to speak with clarity sufficient to convey meaning when the words are later divorced from their context would be unworkable in the real world.

The government, however, advances a rule that would require individuals to invoke the Fifth Amendment right with a clarity and precision seldom found in everyday speech. Falling short of such clarity, the government would permit police officers, who have an incentive to discourage suspects from exercising their Fifth Amendment rights, to "clarify" any ambiguity that the police are able to read into suspects' requests for counsel. This would effectively destroy the *Edwards* rule. Police might be tempted to unearth some ambiguity in the invocations of suspects, which would be easy to do except where a legally-trained suspect declares "I hereby invoke my right to counsel under the Fifth Amendment as construed in *Miranda v. Arizona*." Such a rule would result in unequal treatment based solely on a suspect's eloquence, educa-

overly aggressive or assertive, or too masculine. Ainsworth, *In A Different Register*, 103 Yale L.J. at 18.

[21] It is not difficult to envision other examples where context clarifies statements that might appear ambiguous when considered in isolation. For example, if an employee seeks a raise by telling his or her employer that "maybe I want a raise," the employer has no need to clarify the request to understand that the employee has, in fact, asked for a raise. If the employer responds, "well, maybe I think that if you want more money, you should look for another job," the employee understands that there will be no raise.

tion, or sophistication, characteristics wholly unrelated to a suspect's right to invoke the Fifth Amendment.

The Court has consistently emphasized that it is unnecessary for a suspect to choose his words with lawyer-like precision when invoking his right to counsel, for "[i]nterpretation is only required where the defendant's words, *understood as ordinary people would understand them*, are ambiguous." *Barrett*, 479 U.S. at 529 (emphasis added). *See also McNeil*, 501 U.S. at ___, 111 S. Ct. at 2209; *Minnick*, 498 U.S. at 165 (Scalia, J., dissenting); *Smith*, 469 U.S. at 101 (noting that "statements are rarely that clear; differences between certainty and hesitancy may well turn on the inflection with which words are spoken, especially where, as here, a seven-word statement is isolated from the statements surrounding it") (Rehnquist, J., dissenting).

Similarly, an implicit waiver of *Miranda* rights may suffice because the "question is not one of form." *North Carolina v. Butler*, 441 U.S. 369, 373 (1979). In *Oregon v. Bradshaw*, 462 U.S. 1039 (1983), a plurality of the Court held that a suspect's "ambiguous" question "[w]ell, what is going to happen to me now?" was sufficient to reinitiate a dialogue with the police officers. *Id.* at 1045-46 (plurality opinion). The plurality articulated an objective test that focused on how the statements "*could* reasonably have been interpreted" by the people to whom they were directed. 462 U.S. at 1046 (plurality opinion) (emphasis added).[22] Since ambiguity in a suspect's statement is given a broad interpretation in deciding whether he or she has waived the *Miranda* rights or reinitiated interrogation, the same broad interpretation must be given to a suspect's "ambiguous" request for counsel.

Petitioner was likely to have understood the warnings he received as any other ordinary person would have: he had a right to a lawyer, but was given no notice that the right could only be

[22] The dissent in *Bradshaw* apparently agreed with the standard articulated by the plurality, and disagreed only with the plurality's application of the standard to the facts in that case. 462 U.S. at 1055 (Marshall, J., dissenting).

invoked by a clear and unequivocal request. Having instructed Petitioner that he "ha[d] the right to have [his] retained civilian lawyer and/or appointed military lawyer present during this interview," J.A. 170; App. Ex. XXXVII, the government now seeks to add a gloss not at all apparent to the ordinary persons whose waivers of constitutional rights *Miranda* sought to protect. The government's position, essentially, is that the warning Petitioner received carried an unspoken proviso that he had the right to have his retained civilian lawyer and/or appointed military lawyer present during this interview, *but only if he asked for an attorney in clear and unequivocal terms.*

It would be fundamentally unfair to now inform Petitioner that he failed to satisfy a requirement of which he was unaware while subject to the pressures inherent in custodial interrogation. *See Rhode Island v. Innis*, 446 U.S. 291, 310 (1980) ("In order to perform that function effectively, the warnings must be viewed by both the police and the suspect as a correct and binding statement of their respective rights.") (Stevens, J., dissenting).

Indeed, the warnings themselves are likely responsible for any ambiguity in Petitioner's request for counsel. The warnings given to Petitioner did not explain that a request for counsel itself could not be used against him. Petitioner may have selected the term "maybe" because he thought that requesting a lawyer was tantamount to an admission of guilt. Since there is a reasonable likelihood that the government's own instructions were the cause of any ambiguity in Petitioner's request for counsel, it is only appropriate that the government, rather than Petitioner, should bear the responsibility of any consequences of this ambiguity.

The notion that legal standards must contemplate the ordinary people to whom they apply is hardly unique to *Miranda*. In other contexts, this Court has recognized that the proper inquiry does not focus on what appellate judges would understand; rather, the proper standard must contemplate what ordinary people, who are not schooled in the technicalities of the law, would understand.

For example, in reviewing the specificity of search warrants, this Court has stressed that the affidavits supporting warrants "are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area." *United States v. Ventresca*, 380 U.S. 102, 108 (1965). Thus, "[t]he rigorous inquiry into the *Spinelli* prongs and the complex superstructure of evidentiary and analytical rules . . . cannot be reconciled with the fact that many warrants are—quite properly—issued on the basis of nontechnical, common-sense judgments of laymen applying a standard less demanding than those used in more formal legal proceedings." *Illinois v. Gates*, 462 U.S. 213, 235-36 (1983) (citation omitted).

If police officers, who presumably receive training as to the content and meaning of the Fourth Amendment, are permitted wide latitude in expressing themselves, it must logically follow that a suspect, likely unaware of the intricacies of the Fifth Amendment and in the inherently coercive setting of a custodial interrogation, should be afforded the same latitude in expressing his or her desire to consult with an attorney.[23]

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[23] Similarly, in reviewing whether jury instructions were sufficiently clear to convey the legal criteria to be applied, the Court has looked to whether there is a "reasonable likelihood" that the jurors misunderstood the standard they were to apply. *Boyde v. California*, 494 U.S. 370, 380 (1990). *See also Estelle v. McGuire*, 502 U.S. ___, ___ & n.4, 112 S. Ct. 475, 482 & n.4 (1991). Commentators and courts have also stressed the importance of viewing jury instructions from the perspective of the ordinary citizen who sits as a juror:

> The use of legal terminology in instructions should be avoided as much as possible. In preparing instructions, we should remember that the task is to shed light and not to add to the darkness. . . . [T]o the extent possible, we should use that which Chief Judge Alfred Murrah calls the common speech of man.

Edward J. Devitt, *Ten Practical Suggestions About Federal Jury Instructions*, 38 F.R.D. 75, 76-77 (1965). *See also Downie v. Powers*, 193 F.2d

In this same vein, this Court has held that, because *habeas* petitioners "are often unlearned in the law and unfamiliar with the complicated rules of pleading," courts may not "impose on them the same high standards of the legal art which we might place on members of the legal profession." *Price v. Johnston*, 334 U.S. 266, 292 (1948).[24] At the very least, a suspect who is in the heat of a custodial interrogation must be extended the same latitude of expression.

Ordinary people would consider Petitioner's statement "[m]aybe I should talk to a lawyer" in its context, as should this Court. In its custodial setting, Petitioner's request was sufficiently clear to invoke his Fifth Amendment right to counsel. Petitioner did not merely make a reference to an attorney. *See Barrett*, 479 U.S. at 526-27. Instead, while handcuffed to a chair, Petitioner conveyed a desire to "talk" to an attorney. Although not every reference to an attorney by a suspect in custody requires that questioning cease, *cf. Barrett*, 479 U.S. at 525, Petitioner's statement was not so nebulous. Where the suspect's statement does not qualify or condition his expressed desire to speak to an attorney, all questioning must stop. *Edwards*, 451 U.S. at 484-85.

The conduct of the NIS Agents further confirms that they understood Petitioner's statement as a request for counsel, since they immediately changed the emphasis of their inquiry to a supposed effort to "clarify" the request. Petitioner's second request for counsel, which the NIS Agents elected to honor, was not meaningfully different from the first request. *Compare* J.A. 129; Tr. 304 ("*[m]aybe* I should talk to a lawyer") (emphasis added) *with* J.A. 137; Tr. 310 ("*I think* I want a lawyer before I say anything else.") (emphasis added).[25] The only distinction between the two requests for counsel was that, after the second request, the NIS Agents concluded that they would elicit no more inculpatory statements from Petitioner. Accordingly, the NIS Agents elected to honor Petitioner's second "unambiguous" request for counsel. Of course, under the government's theory, the Agents would have been free to continue the interrogation after "clarifying" the "ambiguity" reflected in the words "I think."

760, 767 (10th Cir. 1951) ("[jury instructions] should be . . . given . . . in the 'common speech of man', so that the laymen to be guided thereby, will have an intelligent understanding of their true meaning.")

[24] This Court has admonished the courts of appeals that they should "liberally construe" the requirements for a notice of appeal. *Smith v. Barry*, 502 U.S. ___, ___, 112 S. Ct. 678, 681 (1992). A more stringent standard cannot apply to requests for counsel made by suspects in custody.

2. Any Ambiguity In A Suspect's Request For Counsel Must Be Resolved In Favor Of The Constitutional Right.

This Court has already rejected the argument that any ambiguity in a suspect's request for counsel must be resolved against the suspect. In *Michigan v. Jackson*, the State argued that a defendant's request for counsel at his arraignment, where the request did not unequivocally demand the presence of counsel at any subsequent interrogation, should not be considered to be a request for representation during any further interrogation by police. 475 U.S. at 632-33. This Court rejected the argument:

> This argument, however, must be considered against the backdrop of our standard for assessing waivers of constitutional rights. Almost a century ago, in *Johnson v. Zerbst*, 304 U.S. 458 (1938), a case involving an alleged waiver of a defendant's Sixth Amendment right to counsel, the Court explained that we should "in-

[26] In sharp contrast to the lower courts and the NIS Agents here, most courts that have considered the question have concluded that a suspect's use of the word "maybe" does not infuse ambiguity into a request for counsel. *E.g., Maglio v. Jago*, 580 F.2d 202, 203, 205 (6th Cir. 1978); *United States v. Prestigiacomo*, 504 F. Supp. 681, 683 (E.D.N.Y. 1981); *People v. Munoz*, 83 Cal. App. 3d 993, 995-96, 148 Cal.Rptr. 165, 165-66 (Cal. Ct. App. 1978); *Commonwealth v. Santiago*, 405 Pa. Super. 56, 69, n.11, 591 A.2d 1095, 1101 n.11, 1102, *appeal denied*, 529 Pa. 633, 600 A.2d 953 (1991).

> dulge every reasonable presumption against waiver of fundamental constitutional rights." *Id.*, at 464. For that reason, it is the State that has the burden of establishing a valid waiver. *Brewer v. Williams*, 430 U.S., at 404. Doubts must be resolved in favor of protecting the constitutional claim. This settled approach to questions of waiver requires us to give a broad, rather than a narrow, interpretation to a defendant's request for counsel. . . .

475 U.S. at 633.

Although the question presented in *Jackson* concerned the waiver of a defendant's Sixth Amendment right to counsel rather than whether a suspect had invoked the Fifth Amendment right to counsel under *Miranda*, the same analysis must apply because *Miranda* and *Jackson* rest on the same constitutional bases. As in *Jackson*, this Court in *Miranda* emphasized the same high standard for waiver that was first applied in *Johnson v. Zerbst*, 304 U.S. 458 (1938). 384 U.S. at 475. *See also id.* at 445. Just as the application of the high standard for waiver in *Jackson* led to the conclusion that any ambiguity demonstrated that there had been no waiver, the same reasoning must apply to a request for counsel in the Fifth Amendment context, because the Fifth Amendment right to counsel exists to protect against unknowing waivers of the privilege against self incrimination.

B. The Interrogators May Not Clarify Any Ambiguity In A Suspect's Expressed Desire To Consult With Counsel.

When confronting a suspect who expresses a desire for counsel, interrogators are required under *Miranda* to cease all questioning. *Edwards*, 451 U.S. at 474-85. This must also be the rule in cases where the request may appear to be ambiguous. *Jackson*, 475 U.S. at 632-33. Under *Edwards*, a suspect whose request conveys that he or she is unable to cope with the pressures of custodial interrogation without the presence of counsel must be provided with counsel. It follows that a suspect who is ambiguous in expressing whether he or she wishes to consult an attorney is even less well-equipped to withstand the pressures of custodial interrogation alone.

Where a suspect is unable even to decide whether he or she needs an attorney, the interrogators may not be entrusted with the responsibility to "clarify" the ambiguity. They have no incentive to do so. Since the police do not represent the interests of the suspect, the risk of coercion and prejudice to a suspect's rights are sufficiently great that prohibiting such "clarification" is warranted as a prophylactic measure. Indeed, to allow the police not to honor an ambiguous request for counsel only adds to the coercive atmosphere. *See Minnick*, 498 U.S. at 162 (Scalia, J., dissenting). Granting the interrogators a license to "clarify" an ambiguous request for counsel would simply appoint the fox to guard the henhouse.

1. A Bright Line Rule Is Necessary Because The Interrogators Have An Incentive To Prevent A Suspect From Making A Knowing And Voluntary Waiver Of His Fifth Amendment Right To Counsel.

The Fifth Amendment right to counsel is founded "on this Court's perception that the lawyer occupies a critical position in our legal system because of his unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation." *Fare v. Michael C.*, 442 U.S. 707, 719 (1979). This Court further noted that "the lawyer's presence helps guard against overreaching by the police. . . ." *Id.* Consequently, the Court ruled that a juvenile's request for the presence of a probation officer could not be considered as a request for counsel because the probation officer could not be expected to provide independent advice to a suspect in the way a lawyer would:

> In these circumstances, it cannot be said that the probation officer is able to offer the type of independent

> advice that an accused would expect from a lawyer retained or assigned to assist him during questioning. Indeed, the probation officer's duty to his employer in many, if not most, cases would conflict sharply with the interests of the [suspect]. For where an attorney might well advise his client to remain silent in the face of interrogation by the police, and in doing so would be "exercising [his] good professional judgment . . . to protect to the extent of his ability the rights of his client," *Miranda v. Arizona*, 384 U.S., at 480-481, a probation officer would be bound to advise his charge to cooperate with the police.

442 U.S. at 721. *See also Oregon v. Elstad*, 470 U.S. 298, 316 (1985) ("[p]olice officers are ill-equipped to pinch-hit for counsel, construing the murky and difficult questions" arising under *Miranda*).

The natural goal of interrogators seeking to "clarify" any supposed "ambiguity" surrounding a suspect's request for counsel is to persuade the suspect not to assert the right to counsel, or to override the timid suspect who invokes the right in sheepish fashion.[26] It was precisely this potential for abuse and "overreaching" that necessitated the prophylactic rule enunciated in *Miranda*. *Smith*, 469 U.S. at 99 n.8. *Miranda* stressed that the warning "may serve to make the individual acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest." 384 U.S. at 469. To allow such persons to advise a suspect whether to request counsel, under the guise of clarifying whether the suspect had invoked that right, would be inconsistent with the very purpose of

[26] As Justice Jackson observed years ago in the context of considering Fourth Amendment claims, the courts must recognize that police are involved in the "often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14 (1948).

Miranda and *Edwards*.[27]

In applying *Miranda*, the Court has declined to engage in any fact-specific inquiry as to whether the police had, in any particular case, actually tricked or otherwise misled the suspect into confessing. *Berkemer v. McCarthy*, 468 U.S. 420 (1984). Rather, the mere potential for such coercive psychological pressure is determinative:

> The purposes of the safeguards prescribed by *Miranda* are to *ensure* that the police do not coerce or trick captive suspects into confessing, to relieve the " 'inherently compelling pressures' " generated by the custodial setting itself, " 'which work to undermine the individual's will to resist,' " and as much as possible to free courts from the task of scrutinizing individual cases to try to determine, after the fact, whether particular confessions are voluntary. Those purposes are implicated as much by in-custody questioning of persons suspected of misdemeanors as they are by questioning of persons suspected of felonies.

[27] The conflicting interests of the interrogator and the suspect are particularly significant in considering whether the police should be permitted to clarify an ambiguous request for counsel. As a practical matter, when police clarify a request for counsel, they are no longer simply reading the *Miranda* warnings. Rather, from the perspective of the suspect, they are likely to be advising a suspect as to whether the suspect should or should not waive the right to remain silent and the concomitant right to counsel. Because of the conflict, however, the courts should not be required to conduct a case-by-case inquiry into the sufficiency of such advice. The incentive of the police officer is likely to affect not only the words but also the manner in which any ambiguity is clarified. Thus, prejudice should be presumed. *See Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (1980) (once defendant makes showing that counsel had actual conflict of interest, prejudice is presumed and courts will not engage in case-specific review for actual prejudice because of the likelihood that the conflict affected the representation).

Id. at 433 (emphasis in original) (footnotes omitted). Since this rationale regarding the mere potential of coercive psychological pressures applies to persons arrested for misdemeanor traffic violations, the same must apply to Petitioner, a murder suspect who was in custody for several weeks before being shackled to a chair and interrogated.

Any rule permitting the interrogators to clarify ambiguity surrounding a suspect's request for counsel would encourage precisely the same sort of badgering of a defendant into waiving his rights that the *Edwards* bright line test was designed to prevent. *See Michigan v. Harvey*, 494 U.S. 344, 350 (1990). Likewise, applying these principles to a suspect's request for counsel which was no more articulate than Petitioner's, this Court held in *Smith v. Illinois* that "[u]sing an accused's subsequent responses to cast doubt on the adequacy of the initial request *itself* is even more intolerable." 469 U.S. at 98-99 (emphasis in original).[28]

Clever police officers will often be able to inject ambiguity where none exists. For example, had the police officers in *Edwards* been permitted to "clarify" Edwards' statement that "I want an attorney before making a deal," a statement that the Court considered "a sufficient invocation of his *Miranda* rights," 451 U.S. at 487, they might have proceeded with the interrogation and secured the attorney only when they were finally prepared to formalize the "deal." In this manner, a suspect's Fifth Amendment right to counsel would soon come to depend on the police officer conducting the interrogation rather than upon the suspect's desire to invoke the constitutional right.

The need for a bright line rule is just as compelling where, as here, ambiguity in a suspect's request for counsel suggests uncer-

[28] It is irrelevant whether the NIS Agents genuinely believed that Davis' statement was ambiguous, for this Court has already adopted an objective standard for assessing a suspect's request for counsel: "[i]nterpretation is only required where the defendant's words, *understood as ordinary people would understand them*, are ambiguous." *Connecticut v. Barrett*, 479 U.S. 523, 529 (1987).

tainty. As the Court observed in *Miranda*, a suspect who is uncertain about the nature of his rights, and how or whether to assert them, is most likely to be susceptible to badgering. *Miranda*, 384 U.S. at 471. In the absence of a rule requiring cessation of questioning after an ambiguous request for counsel, "the authorities through 'badger[ing]' or 'overreaching'—explicit or subtle, deliberate or unintentional—might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance." *Smith*, 469 U.S. at 98 (citing *Bradshaw*, 462 U.S. at 1044; *Michael C.*, 442 U.S. at 719). If anything, the likelihood of overreaching is greatest at the point when the suspect first decides to invoke the right to counsel.

The interrogator whose questioning is halted by a request for counsel, typically at the very point when the questioning becomes increasingly confrontational, J.A. 175; App. Ex. XL, is the interrogator most likely to badger a suspect out of invoking the right to counsel. After all, the reason for badgering is the desire to obtain a confession. Since the danger of impermissible badgering is significant, a *per se* rule must apply so that the "courts can be assured that coercion did not induce the waiver." *Arizona v. Roberson*, 486 U.S. 675, 689 (1988) (Kennedy, J., dissenting).[29] *See generally*, Charles J. Ogletree, *Are Confessions Really Good For The Soul? A Proposal To Mirandize Miranda*, 100 Harv. L. Rev. 1827 (1987).

In this regard, it makes no difference whether the police act in good faith. From the suspect's perspective, clarification is likely

[29] In Petitioner's situation, the risk of badgering was high. The very officers who were trying to secure statements through the interrogation had every incentive to badger him after he expressed a desire to consult with counsel just as the interrogation began to focus on the critical questions. *Cf. Roberson*, 486 U.S. at 690 (where "the danger of badgering is minimal, [the remote possibility is] insufficient to justify a rigid *per se* rule") (Kennedy, J., dissenting). Accordingly, a *per se* rule is appropriate in these circumstances.

to appear as badgering. Having been told that he or she has a right to counsel, a suspect who expresses a desire to consult with counsel and is then questioned about what he or she really means is likely to conclude that the police were insincere in telling him or her that there was a "right" to counsel. Since the clarification is likely to be seen not only as a hesitancy to fulfill the request, but also as an intention not to provide counsel at all, clarification only increases the coercive atmosphere.

2. The Potential For Abuse Requires A "Bright Line" Rule, The Benefits Of Which Outweigh Any Supposed Costs.

Just as the *Edwards* rule fosters judicial economy, a *per se* rule against further questioning would also "conserve[ ] judicial resources which would otherwise be expended in making difficult determinations of voluntariness, and implement[ ] the protections of *Miranda* in practical and straightforward terms." *Minnick*, 498 U.S. at 151. Thus, the benefits outweigh any perceived burdens:

> *Miranda*'s holding has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible. This gain in specificity, which benefits the accused and the State alike, has been thought to outweigh the burdens that the decision in *Miranda* imposes on law enforcement agencies and the courts by requiring the suppression of trustworthy and highly probative evidence even though the confession might be voluntary under traditional Fifth Amendment analysis.

Michael C., 442 U.S. at 718. *See also Roberson*, 486 U.S. at 681-82.

A rule favoring the protection of a suspect's Fifth Amendment right to counsel is unlikely to have any appreciable costs for law

enforcement. Such claims were rejected when the Court first decided *Miranda*, and have been consistently rejected since then. *E.g.*, Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. Chi. L. Rev. 435, 456-60 (1987); Special Project, *Interrogations In New Haven: The Impact Of Miranda*, 76 Yale L.J. 1519 (1967).[30] Indeed, commentators have concluded that *Miranda* has done little, if anything, to impair the ability of police to obtain confessions: "[i]nterrogation warnings and waivers, after all, have been the centerpiece of the law of confessions for more than twenty years and have integrated themselves into the criminal justice process." Mark Berger, *Compromise And Continuity: Miranda Waivers, Confession Admissibility And The Retention Of The Interrogation Protections*, 49 U. Pitt. L. Rev. 1007, 1009 (1988). Thus, the *Miranda* doctrine is a "rule police not only can live with, but one which police can also use effectively to protect the admissibility of confessions." *Id.* at 1010. *See also Withrow v. Williams*, 507 U.S. ___, 113 S. Ct. 1745, 1755 (1993); *New York v. Quarles*, 467 U.S. 649, 663 (1984) (opinion of O'Connor, J.) (" 'meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures' ") (quoting *Innis*, 446 U.S. at 304 (Burger, C.J., concurring)); Schulhofer, *Reconsidering Miranda*, 54 U. Chi. L. Rev. at 455-57; Joseph D.

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[30] The government has suggested that providing an attorney would interfere with defendants' desires to unburden themselves by confessing. Opposition To *Certiorari* at 11-12. This same argument, however, could be used against *Miranda* warnings. Perhaps the government was simply trying to express a concern that a more protective application of *Miranda* would work to undermine the government's ability to obtain convictions. Again, a similar argument was made against *Miranda*, was rejected at the time, and has since been disproven through experience. The percentage of cases which result in guilty pleas remains high: 73 percent in the civilian federal system and 76 percent in the Navy and Marine Corps. *See* L. Ralph Mecham, *Report Of The Proceedings Of The Judicial Conference Of The United States Courts*: Annual Report Of The Director Of The Administrative Office Of The United States Courts at Table D-4 (1992); Letter from Chief Judge, Navy-Marine Corps Trial Judiciary to Navy Judge Advocate General (dated Dec. 11, 1992) Subject: Fiscal Year 1992, Fourth Quarter FY-92 Statistical Reports And Comparative Charts.

Grano, *Selling The Idea To Tell The Truth: The Professional Interrogator And Modern Confessions Law*, 84 Mich. L. Rev. 662 (1986). In short, the government's reluctance to provide lawyers to suspects who express their desire for counsel without precision is little more than thinly veiled dissatisfaction with the Fifth Amendment itself.

Miranda also placed the burden of proving a knowing and voluntary waiver squarely on the shoulders of the State: "[s]ince the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during the incommunicado interrogation, the burden is rightly on its shoulders." 384 U.S. at 475. This observation is particularly *appropos* here. The Agents elected not to record or videotape any part of this interrogation, or even to secure a second written waiver from Petitioner after his initial request for counsel, although they could have easily done so. J.A. 121-122; Tr. 297-298.[31] Since it had the opportunity to create a clear record, and deliberately chose not to do so, the government should not be given the windfall of any added ambiguity it created in the first place.[32]

The presence of an attorney will not only ensure that a suspect's waiver of his or her Fifth Amendment rights is knowing and voluntary, it may serve "subsidiary functions as well." *Miranda*, 384 U.S. at 470. For example, the presence of an attorney following an ambiguous request for counsel would save the courts from

[31] It is not necessary that police tape record all interrogations. Nonetheless, several police departments do record many interrogations. *E.g., California v. Prysock*, 453 U.S. 355 (1981); *Edwards*, 451 U.S. at 479; *Borg*, 918 F.2d at 1389, *cert. denied*, ___ U.S. ___ 112 S. Ct. 198 (1991). Such tape and video equipment was available to the Agents here but use of the equipment was not even considered. J.A. 121-22; Tr. 298.

[32] One commentator has recognized that "the subtle messages that can be communicated through changes in vocal inflection and nonverbal communication pose a formidable factfinding task. . . ." Welsh White, *Police Trickery In Inducing Confessions*, 127 U. Pa. L. Rev. 581, 586 (1979).

becoming involved in a morass of cases where the only critical issue concerns the language the suspect actually used in his ambiguous attempt to invoke counsel.[33]

C. Under Any Standard, The Government Has Not Shown A Knowing And Voluntary Waiver Of Petitioner's Right To Counsel.

Even if police officers were permitted to conduct the limited inquiry suggested by the government, Opposition To *Certiorari* at 10, Petitioner is still entitled to a new trial because the Agents' comments were not limited in this manner.[34]

In reviewing whether the government can show a knowing and voluntary waiver of a suspect's Fifth Amendment right to counsel, a court must consider the suspect's individual characteristics as part of the totality of circumstances. *Butler*, 441 U.S. at 374-75. Viewed in this manner, the impropriety of the Agents' comments after Petitioner's request was magnified by the distinctively coercive military setting in which it occurred. Further, Petitioner's psychiatric state, with which the Agents were familiar, made him more vulnerable to the Agents' improper questions. Thus, the

[33] There was such a factual dispute in this case. By adopting a clear standard, however, the Court can eliminate the need for such disputes over simple historical facts and facilitate appellate review. *See* Ogletree, 100 Harv. L. Rev. at 1843. *Cf.* Comment, *Pretext Searches and the Fourth Amendment*, 137 U. Pa. L. Rev. 1791, 1803 & n.66 (1989) (noting that "broad discretion and nebulous standards . . . frustrate appellate review").

[34] The government has not yet disclosed the manner in which it would propose to limit the inquiry. Presumably the interrogator would be permitted to ask no more than a few short and direct questions about the suspect's desire for counsel. For example, it may be proper in some cases for police to state: "You have a right to a lawyer. If you cannot afford one, a lawyer will be provided for you at no charge. The fact that you have requested a lawyer will not be held against you in any way. If you want a lawyer, we will stop questioning you and we will get you a lawyer. Would you like to talk to a lawyer?" That, however, is not what occurred here. Clarification should only be permitted where it is possible, but unlikely that a suspect is requesting counsel. Any clarification permitted must be simple, neutral, and reasonably designed to ascertain the suspect's intent. *See* James J. Tomcovicz, *Standards For Invocation And Waiver Of Counsel In Confession Contexts*, 71 Iowa L. Rev. 975 (1986).

government cannot show that Petitioner's statements were the product of a knowing and voluntary waiver.

1. The NIS Agents Did Not Limit Their Post-Request Questions In A Manner Calculated Only To Clarify Ambiguity In The Request.

The NIS Agents' first comments to Petitioner after his statement "[m]aybe I should talk to a lawyer" did little if anything to clarify his request. Rather than suggest that it was his right to consult with a lawyer, the NIS Agents changed the focus of the conversation to the appropriateness of their conduct in interrogating him: "[We] made it very clear that we're not here to violate his rights. . . ." J.A. 136; Tr. 310.[35] Although perhaps literally true, the statement was not balanced by the equally accurate and more appropriate warning that the Agents were not there to protect his rights either. Their comment was, at best, disingenuous, for their failure to administer the *Miranda* or Article 31(b) warnings prior to or during the October 20 interrogation demonstrates that these Agents were anything but guardians of Petitioner's constitutional rights.[36] *See United States v. Whitehead*, 26 M.J. 613 (A.C.M.R. 1988) (agent's statement to the effect that suspect had no need for attorney if he did nothing wrong was beyond permissible limit of clarification). As they knew or should have known, Petitioner could reasonably have construed the Agents' statements as suggesting that they were there to protect him. *Cf. Innis*, 446 U.S. at 301. This was patently misleading.

[35] Like a Freudian slip, the Agents' non-responsive statement suggests that the thought of violating Petitioner's constitutional rights was very present in their minds.

[36] The Court has granted *certiorari* where the question presented is whether a police officer's subjective belief that a person is not a suspect excuses the failure to provide the warnings required by *Miranda*. *Stansbury v. California*, ___ U.S. ___, 114 S. Ct. 380 (Nov. 1, 1993). Here, the NIS Agents should have provided Petitioner with Article 31(b) and *Miranda* warnings prior to the October 20 interrogation because *Miranda* did not countenance police deciding questions of waiver. 384 U.S. at 486 n.55.

By shifting the focus of the conversation away from Petitioner's right to counsel to the constitutionality of their conduct, the Agents did nothing to help him understand, much less exercise, his right to counsel. If anything, this misdirection suggested that the Agents' conduct was entirely proper and that they were protecting Petitioner's constitutional rights. Thus, one message sent by the interrogator's "clarification" was that Petitioner could "trust" the NIS Agents, a statement that was not only inaccurate in terms of their conflicting interests but went well beyond mere clarification.

This interpretation of the psychology running beneath the surface of the Agents' comments is consistent with this Court's analysis of similar interrogation techniques twenty-five years ago in *Miranda*:

> The manuals also contain instructions for police on how to handle the individual who refuses to discuss the matter entirely, or who asks for an attorney or relatives. The examiner is to concede him the right to remain silent. This usually has a very undermining effect. First of all, he is disappointed in his expectation of an unfavorable reaction on the part of the interrogator. Secondly, a concession of this right to remain silent impresses the subject with the apparent fairness of his interrogator.

384 U.S. at 453-54 (footnotes omitted).[37] In this regard, it is immaterial whether the NIS agents actually intended to use subtle interrogative techniques to undermine Petitioner's desire to invoke his right to counsel, for the focus of the constitutional inquiry is "primarily upon the perceptions of the suspect." *Innis*, 446 U.S. at

[37] It is also possible that Petitioner perceived the Agents' comments as a defensive response because they regarded his request as an accusation that they had been acting improperly. Since Petitioner may have been seeking the Agents' approval given their positions of authority, *see Miranda*, 384 U.S. at 454, it is natural that he would agree to withdraw his request in order to appease them.

301. In any event, the continued use of such psychological ploys[38] reinforces the need for a prophylactic rule.

Just as revealing as the innuendo contained in what the NIS Agents did tell Petitioner is what they did not say. Notably absent from their comments is *any* further advice about Petitioner's Fifth Amendment right to counsel. The Agents did not instruct Petitioner that there was nothing improper about his request for an attorney.[39] Nor did they make even the slightest effort to explain to Petitioner how he could actually obtain counsel.

In sum, the Agents' statements after Petitioner's request for counsel did nothing to clarify the request. Instead, their comments reinforced the coercive nature of the custodial interrogation and made it more difficult, rather than easier, for Petitioner to persist in his request for counsel. Since "any evidence that the accused was threatened, tricked or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege," *Miranda*, 384 U.S. at 476, the statements taken after the request for counsel should have been suppressed.

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[38] There is, even today, as great a need for the prophylaxis of *Miranda* as when the case was first decided. *E.g., Cooper v. Dupnik*, 924 F.2d 1520, 1523-24 & nn.1-2 (9th Cir. 1991) (holding that there was qualified immunity for civil rights claim, and discussing Tucson Police Department's policy to allow police officers to disregard, at their discretion, a suspect's request for counsel so that statements obtained may be used to impeach defendant who takes the stand or to prevent defendant from taking stand), *reversed*, 963 F.2d 1220, 1248 (9th Cir.) (*en banc*) (finding qualified immunity not available because departmental policy of violating settled principles of *Miranda* "shocks the conscience"), *cert. denied*, ___ U.S. ___, 113 S. Ct. 407 (1992).

[39] For example, the Agents could have instructed Petitioner that his silence or his desire to consult with an attorney could not be used against him in any manner. *See Wainwright v. Greenfield*, 474 U.S. 284, 295 (1986); *Doyle v. Ohio*, 426 U.S. 610, 618 (1976); *Sizemore v. Fletcher*, 921 F.2d 667, 671-72 (6th Cir. 1990); *United States v. Hilstead*, 671 F.2d 950, 953 (5th Cir. 1982) (*per curiam*); *Washington v. Harris*, 650 F.2d 447, 454 (2d Cir. 1981), *cert. denied*, 455 U.S. 951 (1982).

2. The Inherently Coercive Military Environment In Which The Interrogation Took Place Further Undermined The Voluntariness Of Petitioner's Waiver Of His Right To Counsel.

As this Court has recognized, "the military is, by necessity, a specialized society separate from civilian society." *Parker v. Levy*, 417 U.S. 733, 743 (1974). *See also Goldman v. Weinberger*, 475 U.S. 503, 506-07 (1986).

Military society is vastly different than the civilian world. The commitment to individuality and individual rights which characterizes much of American society is largely absent in the military community. In its place is an equally strong commitment to conformity and to the requirements of the military unit over those of individual military personnel. Thus, "[t]he fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it." *Parker*, 417 U.S. at 760.

Nowhere is this divergent application of constitutional rights more evident than in the curtailment of the right of military personnel to freely express themselves. Thus, military personnel may be punished for such offenses as disrespect, UCMJ Articles 89, 91, 10 U.S.C. §§ 889, 891 and contempt toward officials, UCMJ Art. 88, 10 U.S.C. § 888. It is against this backdrop of submission to authority that the government evidently demands that military suspects assert their right to counsel with the same decisive vigor as civilians whose lives are not constrained by similar restraints on expression. Petitioner's training and experience within the military, and the very nature of the military itself, undermined his ability to invoke his right to counsel in a form clearer than "[m]aybe I should talk to a lawyer."

Consequently, the voluntariness *vel non* of Petitioner's waiver of his Fifth Amendment rights must be assessed within the military setting in which it occurred. The Court of Military Appeals has long recognized that the military environment creates unique impediments to a suspect's ability to invoke the right to counsel:

> Because of the effect of superior rank or official position upon one subject to military law, the mere asking of a question under certain circumstances is the equivalent of a command. A person subjected to these pressures may rightly be regarded as deprived of his freedom to answer or to remain silent.

United States v. Gibson, 3 C.M.A. 746, 752, 14 C.M.R. 164, 170 (1954). *See also United States v. Ravenel*, 26 M.J. 344, 349 (C.M.A. 1988); *United States v. Lewis*, 12 M.J. 205, 206 (C.M.A. 1982). As the Court of Military Appeals further explained:

> Conditioned to obey, a serviceperson asked for a statement about an offense may feel himself to be under a special obligation to make such a statement. Moreover, he may be especially amenable to saying anything his military superior wants him to say—whether it is true or not.

United States v. Armstrong, 9 M.J. 374, 378 (C.M.A. 1980).

These significant pressures were recognized as early as 1917: "[in] military cases, in view of the authority and influence of superior rank, confessions made by . . . [subordinates]" might not be truly voluntary, and either should not be admitted at all, or should be viewed with caution. A Manual For Courts-Martial, United States Army ¶ 225 (1917). Congress later acknowledged these coercive pressures to confess when it enacted the Elston Act, which made the use of such coercive measures "conduct [prejudicial to] good order and discipline," *i.e.*, a military offense. Article 24, Act of June 24, 1948, ch. 625, sec. 214, 41 Stat. 792.

Indeed, these subtle yet coercive pressures motivated Congress in 1951, to provide servicemembers with the Article 31(b) protections, which were then almost unknown in the civilian world. *See Armstrong*, 9 M.J. at 378 (citation omitted). *See also* Manuel E. F. Supervielle, *Article 31(b): Who Should Be Required To Give Warnings*, 123 Mil. L. Rev. 151, 181 (1989). Thus, the Court of Military Appeals has recognized that a servicemember's right to

counsel must be guarded in ways unnecessary for civilians because, from the first day of training and throughout his or her military career, a servicemember is trained "to respond almost unthinkingly to the wishes of a military superior" and even to fear court-martial for a failure to respond. *Ravenel*, 26 M.J. at 349 & n.3. It was for this reason that the Court of Military Appeals construed Article 31 as applying "in situations far more subtle than the custodial interrogation situation defined . . . in *Miranda*. . . ." *Id.* at 349 (citations omitted).

Petitioner was assigned to the guided missile destroyer U.S.S. MAHAN (DDG-42), a combat ship[40] whose mission demanded unhesitating submission to orders and respect for authority. Only one year out of basic training or "boot camp," Petitioner held the second lowest rank in the military; seaman apprentice. He was vulnerable to suggestion from the outset. When confronted by NIS Agents while handcuffed to a chair, and subjected to the coercive pressures of a military interrogation, he must have been overwhelm[illegible] Thus, his request for counsel must be viewed for what it was: as unequivocal an invocation of the Fifth Amendment right as could reasonably be expected.

3. Petitioner's Known Psychiatric Problems Further Suggest That He Was Particularly Susceptible To The Agents' Overreaching.

Also among the individual characteristics that must be considered in assessing the voluntariness of Petitioner's waiver of his right to counsel is his mental condition. *Colorado v. Connelly*, 479

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[40] The principal mission of a guided missile destroyer is to operate offensively and defensively against submarines and surface ships, and to take defensive actions against air attacks. It also provides gunfire support for amphibious assaults, and performs patrol, and search and rescue missions. Naval Orientation Manual, NAVEDTRA 16138-H (1991). In sum, Petitioner was a member of a "front line" unit where the need for strict discipline was high.

U.S. 157, 164-65 (1986).[41] The Agents did not take precautions to ensure that any statement obtained from Petitioner was the product of a knowing and voluntary waiver, although they were well aware of his mental and psychiatric deficiencies.[42] Instead, they took advantage of his uncertain psychiatric state.

Petitioner had been in custody when he was "arrested" by the NIS Agents, who placed him in handcuffs at the psychiatric ward as they took him to their stationhouse. J.A. 118; Tr. 295. The records that the NIS Agents had already obtained reflected that Petitioner had only received a high school equivalency certificate. Defense Ex. R. They also knew of his bizarre statements regarding killing someone. J.A. 19, Tr. 197. What they did not yet know when they interrogated him was that he had been suspended from his high school several times, and transferred to another from which he apparently withdrew prior to graduation. J.A. 185; App. Ex. LXIII numbers 1, 2, 11. Additionally, interviews at his former high school in Millersburg, Ohio, revealed that he had been chronically in trouble. One former teacher recalled Petitioner as "one of the ones you don't forget" because he made her feel uncomfortable and afraid. One example "typical" of his behavior was his use of a ball point pen to stab his hand until the entire desk was

[41] In *Connelly*, the Court held that "coercive police activity is a necessary predicate to the finding that a confession is not voluntary" and that the "deficient mental condition" of the suspect does not, without more, render a confession involuntary. 479 U.S. at 164, 167. The Court, however, held that mental condition was relevant to an individual's susceptibility to police coercion. *Id.* at 164-65.

[42] Petitioner's attending physician in the psychiatric ward was Doctor Sentell, the husband of the lead NIS Agent who conducted the interrogation. Article 32 Investigation transcript 120-21; J.A. 132, Tr. 306. In this regard, it is noteworthy that the hospital records contain the following notation:

> *Pt not to leave staff's eyesight ever! ! ! !*
>
> NO VISITORS ! !
>
> Unless screened by DOC Sentell

App. Ex. LXI (emphasis in original).

covered with blood. J.A. 184; App. Ex. LXIII. Further, the Agents knew that Petitioner had been detained in the psychiatric ward, and held essentially incommunicado without benefit of any hearing to challenge his detention.[43] Finally, Petitioner had been under constant watch, and was forced to wear red pajamas so that he was particularly visible. App. Ex. LXI, page 3.

When Petitioner said, after over an hour of interrogation in unfamiliar surroundings, [m]aybe I should talk to a lawyer," the Agents first response was that "[we] aren't hear to violate your rights." J.A. 136; Tr. 310. In this environment, it is hardly surprising that Petitioner, who had been diagnosed with "Ineffective individual coping skills. . . ." App. Ex. LXI at p.3, and an antisocial personality disorder, Pros. Ex. 63, did not invoke his right in clearer terms. While it is unclear whether the NIS Agents were responsible for the manner of Petitioner's detention, and although they were not to blame for his psychiatric condition before he was confined, they certainly took advantage of the situation. Given these facts, Petitioner's "request for counsel followed quickly by a waiver suggests confusion at best," rather than a knowing and voluntary waiver. *Maglio*, 580 F.2d at 206.

D. Remand Is The Appropriate Remedy.

This Court should remand to allow the lower courts to consider whether the government can show that the admission of the statements improperly taken from Petitioner were harmless beyond a reasonable doubt. *Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246 (1991). Although the government has argued in opposition to the *Certiorari* Petition that any error was harmless beyond a

[43] Because his confinement had been characterized as "medical," Petitioner had no right to immediate review of the detention as he would have had the detention been properly characterized as pretrial confinement. *Gerstein v. Pugh*, 420 U.S. 103 (1975). *See also United States v. Holloway*, ___ M.J. ___, No. 93-5010 (C.M.A. 1993); *United States v. Rexrote*, ___ M.J. ___, No. 93-5007 (C.M.A. 1993).

reasonable doubt, that claim should be considered, in the first instance, by the lower courts. *See Austin v. United States*, 509 U.S. ___, ___, 113 S. Ct. 2801, 2812 (1993) (where lower courts did not consider argument, "[p]rudence dictates that we allow the lower courts to consider that question in the first instance"); *Yee v. City of Escondido*, 503 U.S. ___, ___, 112 S. Ct. 1522, 1534 (1992); *Masson v. New Yorker Magazine, Inc.*, 501 U.S. ___, ___, 111 S. Ct. 2419, 2437 (1991). Remand to the Navy-Marine Corps Court of Military Review is particularly appropriate in view of the plenary, *de novo* fact-finding powers of the Courts of Military Review. UCMJ Art. 66, 10 U.S.C. § 866. *See also United States v. Cole*, 31 M.J. 270 (C.M.A. 1990); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987).

Even if the Court undertakes a harmless error analysis, the government is unable to show that the error did not contribute to the verdict. *Fulminante*, 499 U.S. at ___, 111 S. Ct. at 1265; *Chapman v. California*, 386 U.S. 18, 24 (1967). Contrary to the government's argument that the evidence was "overwhelming[ ]," Opposition To *Certiorari* at 14, the verdict itself shows that the jury considered the case to be a close one. Although the government charged Petitioner with premeditated murder committed in the course of a robbery, the jury was unconvinced of premeditation and reached, in essence, a compromise verdict. Thus, the jury verdict, by itself, casts doubt on the harmlessness of the error.

The trial record further shows that a finding of harmless error is unjustified. The government lacked any eyewitness to the murder. Although there was evidence placing Petitioner at the Enlisted Club on the night of the murder, several hundred other sailors were also present. While circumstantial evidence of blood stains took up a large part of the government case, the type O spots of blood found on Petitioner's trousers and tennis shoes is shared by almost half of the world population. Tr. 907. Similarly, the government could not link the blood stain found on Petitioner's pool cue case to the victim since no positive blood type was established. Tr.

906. The linchpin of the government's case became Petitioner's supposed confession to Mull. The government's own evidence, however, undermined the reliability of Mull's report of Petitioner's alleged confession.

Mull's testimony about the statements allegedly made to him by Petitioner can be broken down into six "facts." J.A. 181, Tr. 747. Petitioner told Mull that: (1) he killed Shackleton by striking him with a pool cue over a $30 gambling debt;[44] (2) he then went to his girlfriend's house where he burned his clothes in the fireplace; (3) he thought he'd put one of his victim's eyes out, or at least had "messed [it] up pretty bad"; (4) he could not remove a blood stain on one of his cue sticks; (5) he and the victim had the same blood type; and (6) he had an alibi. At trial, the government's theory was that Petitioner had lied to Mull about an alibi, but had told the truth about killing Shackleton. In its attempt to corroborate this supposed confession to the murder, the government also disproved the remaining four "facts" in Petitioner's alleged confession to Mull.

For example, the government relied on the clothes Petitioner was wearing to link Petitioner to someone with type O blood, the blood type of the victim. Accordingly, the government abandoned Mull's testimony that Petitioner had burned his clothes.[45] Likewise, the autopsy photographs showed that there was no injury to Shackleton's eyes. This contradicted Mull's testimony that Petitioner "put out" the victim's eyes. Next, the government's expert

[44] The government's theory at trial overlooked why the murderer, whose intent it allegedly was to rob Shackleton, would have taken only $30 and left $205.63, Pros. Ex. 46, that was found in Shackleton's pocket. Tr. 562. The government's theory also rested on the questionable assumption that Shackleton was that rare breed of young enlisted sailor who, on payday after receiving $249, Pros. Ex. 24, would not spend more than $13.37 while drinking, gambling on pool games in a bar, playing golf, eating pizza, and taking a cab. Tr. 577, 578, 581, 591. (Shackleton starts with $249.00. The perpetrator takes $30.00 leaving $219.00. Thus, he spent only $13.37).

[45] Indeed, the government called Petitioner's girlfriend, who testified that she did not even have a fireplace. Tr. 1025.

chemist testified that there were no blood stains on Petitioner's pool cues, again refuting Mull's assertion that Petitioner was worried about such stains. Indeed, the government's reliance on blood stains turned on Petitioner and his alleged victim having different blood types. This again contradicted Petitioner's supposed confession to Mull.

In sum, the government's case presupposed, initially, that Petitioner had actually confessed to Mull. The government's theory further assumed that Petitioner's alleged statement that he had killed Shackleton was true, but that virtually everything else he had told Mull was false. The factual inconsistencies between the record and the supposed statement raise the question whether Petitioner actually told Mull anything. That Mull had reason to retaliate against Petitioner further undermines the reliability of the statement. Mull came forward with his evidence only as he himself was being interrogated after Petitioner alleged that Mull was running an unlawful money-lending operation. Indeed, Mull admitted that he knew that Petitioner had reported Mull's loansharking to the authorities before Mull related Petitioner's supposed admissions. Tr. at 764.

It is well-established that confessions "have always ranked high in the scale of incriminating evidence." *Brown v. Walker*, 161 U.S. 591, 596 (1896). *See also Bruton v. United States*, 391 U.S. 123, 135-36 (1968). The cornerstone of the government's case against Petitioner was the confession that he supposedly made to Mull. Yet Mull's reliability was a significant problem for the prosecution.

In reaching for some way to lend credibility to Mull's account, the government recognized the long-settled rule that the " 'reliability of a given witness may well be determinative of guilt or innocence.' " *Giglio v. United States*, 405 U.S. 150, 154 (1972) (*quoting Napue v. Illinois*, 360 U.S. 264, 269 (1959)). Thus, the government turned to Petitioner's illegally obtained statement to the effect that, if he had killed someone, he would have had to tell

someone. This statement was employed to bolster Mull's claim that Petitioner had confessed to him and made Mull's report of what might otherwise be viewed as empty and possibly delusional statements about the murder, (if the jurors believed the statements were made), appear more sinister than they otherwise would have. The government then exploited Petitioner's illegally obtained statement in its closing argument:

> Finally, the accused told NIS that if he had killed the guy, that if he had killed this guy, he would have to tell someone. In fact, he told several someones.

Tr. 1373. The government peppered its closing argument with references to the various instances where Petitioner "told multiple witnesses" and "admitted to the killing." Tr. 1363, 1375. The only arguable admission, however, was the alleged statement to Mull. J.A. 181; Tr. 747.

In short, harmless error analysis must contemplate that the government relied solely upon circumstantial evidence and Mull's report. This report, without more, was completely unreliable because it was contradicted on multiple salient points by other evidence. Without the validation of Petitioner's statement that he would have to tell someone if he had killed another, Mull's statement would have been ignored. Since that statement was the centerpiece of the government's case, the error was far from harmless; it was determinative.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court reverse the judgment of the Court of Military Appeals and remand for appropriate proceedings.

Respectfully submitted,

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No. 92-1949

(6)

In the Supreme Court of the United States

OCTOBER TERM, 1993

ROBERT L. DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a law enforcement officer may ask questions limited to clarifying a suspect's wishes when the suspect makes an ambiguous comment regarding counsel during a custodial interrogation.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Military Appeals, Pet. App. 1a-11a, is reported at 36 M.J. 337. The opinion of the Navy-Marine Corps Court of Military Review, Pet. App. 12a-15a, is not officially reported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on March 11, 1993. The petition for a writ of certiorari was filed on June 8, 1993, and was granted on November 1, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides in relevant part:

> No person * * * shall be compelled in any criminal case to be a witness against himself. * * *

Article 31 of the Uniform Code of Military Justice provides (10 U.S.C. 831):

> (a) No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.
>
> (b) No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.
>
> (c) No person subject to this chapter may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.
>
> (d) No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.

STATEMENT

Petitioner, a member of the United States Navy, was convicted at a general court-martial on one specification of unpremeditated murder, in violation of Article 118 of the Uniform Code of Military Justice, 10 U.S.C. 918. He was sentenced to confinement for life, a dishonorable discharge, forfeiture of all pay and allowances, and a reduction in rank to pay grade E-1. The convening authority approved the findings and sentence. The Navy-Marine Corps Court of Military Review affirmed. Pet. App. 12a-15a. The Court of Military Appeals granted discretionary review and affirmed. Pet. App. 1a-11a.

1. On the evening of October 2, 1988, Seaman Keith Shackleton played pool with petitioner in the Enlisted Men's Club at the United States Naval Base in Charleston, South Carolina. Tr. 583, 606, 619-620, 639-641, 714, 728, 746-747. Shackleton lost the game and a $30 wager, but he refused to pay. After the club closed, petitioner killed Shackleton on the loading dock of the commissary, a short distance from the club, by beating him with a pool cue. Tr. 714, 728, 746-747. Shackleton's body was found early the next morning by a milk delivery man. Tr. 662.

In the first stage of the ensuing investigation, some 100-250 sailors were interviewed, including petitioner. J.A. 36. During his first interview on October 20, 1988, petitioner said that he was at the Enlisted Men's Club playing pool on the night of the murder. Appellate Exhibits (AXs) 28, 36; J.A. 68; Tr. 792-796. Petitioner said that he recognized a photograph of Shackleton and believed that he had played pool with him. Tr. 792-796. He also said that two individuals named Wade Bielby and Bonnie Krusen had told him about Shackleton's murder and had told him that Shackleton had been "beaten with a pool stick." AX 28; see also Tr. 65, 792-796.[1] At the end of the interview, petitioner agreed to turn his

[1] Both Krusen and Bielby testified that they had not discussed Shackleton's murder with petitioner during the pertinent time period. Tr. 852-853, 855.

pool cues over to the Naval Investigative Service (NIS) agents. *Ibid.*[2] While surrendering his two pool cues and their case, petitioner pointed out a stain that he said he thought was either his blood or catsup. AX 28; Prosecution Exhibit (PX) 7; Tr. 795-796.

As the investigation continued, NIS agents discovered that shortly after Shackleton's murder, petitioner told several fellow sailors that he had committed the crime. Petitioner's account of the murder involved details of the crime that only the murderer would have known, or otherwise clearly indicated that petitioner had been involved in the murder. For example, on October 5, 1988, in a conversation that Petty Officer David Guidry had with petitioner, Guidry said he had heard that Shackleton died by falling and injuring his head. Petitioner corrected Guidry, stating that Shackleton had been "beat up and stuck with a pool stick." Tr. 269-270, 702. In addition, on October 27, petitioner told Petty Officer Ronald Mull that NIS was investigating petitioner for the murder of the man killed behind the commissary. Tr. 746. When asked directly if he did it, petitioner told Mull, "Yes, I did." *Ibid.* Petitioner told Mull that he was playing pool at the Enlisted Men's Club and "beat the guy out of $30.00" and that the "guy" did not want to pay. Tr. 747. The two had an argument, and they ended up outside the

[2] NIS agents had been looking for people who owned their own pool cues based on preliminary indications that Shackleton's injuries were consistent with being struck by a pool cue. J.A. 14, 23. NIS obtained cues from several individuals during the investigation. J.A. 23.

club. *Ibid.* Mull testified that petitioner related the following, *ibid.*:

> He said that he hit the guy with a pool—his pool stick a couple of times and he said he thought he put one of the guy's eyes out; said it was messed up pretty bad. He said—I don't know exactly where he was at, but he said he drug the guy's body behind the commissary and then he said he ran down into the woods and left the base somehow. * * * He said he went to a girlfriend's house. * * *

Petitioner told Mull that he had an alibi; he was seen by several people with "some girl" at the club. Petitioner also said that NIS had taken his pool cues and that one of them had a blood stain that he had tried to wash off and erase with sandpaper. Petitioner said he was not worried, however, because he had the same blood type as the victim. *Ibid.*[3] Petitioner also made various other, similar incriminating statements.[4]

[3] Petitioner was wrong. His blood type is B; Shackleton's was O. Tr. 907-908, 914.

[4] On October 19, 1988 (the day before NIS first interviewed petitioner), petitioner told Petty Officer Steven Brothers that he had been accused of murder. Tr. 274, 707. When Brothers asked why, petitioner said that the authorities had found someone dead on the base, that he had played pool with the victim the night before, and that the authorities were accusing him of beating the victim with a pool cue. Tr. 274, 708.

One day in October 1988, petitioner told Petty Officer Richard Kuhn that NIS had taken his pool cues because he had played pool with this "guy." Petitioner also stated that the "guy" owed him money after the game but did not pay, so petitioner hit him over the head with a pool cue. Tr. 288,

With those statements in hand, NIS agents arrested petitioner on November 4. J.A. 118.[5] After receiving the appropriate warnings both orally and in writing, petitioner agreed to talk with two NIS agents. J.A. 170 (AX 37); see also J.A. 118-119, 151-152, 175 (AX 40). When asked if he wanted to have a lawyer present, petitioner specifically declined. J.A. 118-119, 175 (AX 40). He then signed a form indicating that he wished to waive his rights to remain silent and to have a lawyer present during questioning. J.A. 170 (AX 37).

During the first part of the interview, petitioner described his activities during October 1 and 2, 1988. AXs 38, 40; Tr. 957-958. Specifically, petitioner stated that he was at the Enlisted Men's Club with his girlfriend. He said he may or may not have played pool, but that he always has his pool cues with

714. Petitioner also told Kuhn that he did not know whether the victim had died, and that he did not care. *Ibid.*

In mid-October 1988, when asked why he was not playing pool, petitioner told Petty Officer Walter Crayton Black that NIS had taken his pool cues. Tr. 272, 728. Petitioner explained that someone had been killed on the base, that he had been playing pool with him, that he was the last one seen with him at the Enlisted Men's Club, and that he had won $30 from the victim but had no reason to be involved in the murder. *Ibid.*

[5] Petitioner was arrested as he was released from a psychiatric evaluation that his command had ordered because he had made statements to the effect that he wanted to kill someone just to see what it was like. AX 31; Tr. 207-208, 1101-1103. In addition, on October 20, 1988, petitioner told his division officer that he felt like shooting someone, "[b]etter yet, a cop because then I know [they] will kill me." AX 33; Tr. 775. The latter statement was not admitted at trial. *Ibid.*

him. *Ibid.* Petitioner said that he subsequently went to an off-base nightclub called "J.W.'s" and then to his girlfriend's house. *Ibid.*

The NIS agents confronted petitioner with his girlfriend's statement that she was not at the Enlisted Men's Club that night. Tr. 958-959. Petitioner then changed his story, saying that he was at the Enlisted Men's Club with some friends. AXs 38, 40; Tr. 959. The agents then confronted petitioner with a statement he had made indicating that he had won $30 playing pool with Shackleton. AXs 38, 40; Tr. 960. Petitioner denied playing pool with Shackleton and denied winning $30. *Ibid.*

About 80 minutes into the interview, petitioner made what the agents characterized as "an offhanded comment" (J.A. 142, 152), saying, "Maybe I should talk to a lawyer." AXs 38, 40; J.A. 120, 129, 135, 152. The agents immediately stopped all questioning of petitioner and sought to clarify his request, explaining that if he wanted an attorney, they would not ask him any more questions. J.A. 151. Special Agent Sentell described the ensuing exchange as follows:

> [I] made it very clear that we're not here to violate his rights, that if he wants a lawyer, then we will stop any kind of questioning with him, that we weren't going to pursue the matter unless we have it clarified is he asking for a lawyer or is he just making a comment about a lawyer, and he said, ["]No, I'm not asking for a lawyer," and then he continued on, and said, "No, I don't want a lawyer," and then he said he didn't kill the guy and he said that he was the type of person that if he did kill the guy, he'd have to tell someone about it.

J.A. 136; see also J.A. 132-133, 139, 142, 151-154, 160-163.

After confirming that petitioner did not want a lawyer, the agents recessed for a short break. Petitioner was asked if he wanted a drink or a cigarette. J.A. 120, 128, 158.[6]

At the beginning of the second portion of the interview, the NIS agents reminded petitioner that he still enjoyed the rights about which he previously had been advised. J.A. 130. Petitioner began to discuss a conversation that he had with Petty Officer Guidry, during which he told Guidry that the man who died behind the commissary had been killed with a pool cue. When asked why he said that, petitioner said he like to "mess" with people and make them think he knew more than he did. AXs 38, 40; Tr. 961. When asked why he said the man had been "hit and jabbed," petitioner said that he added that detail in order to make his description sound more realistic. Petitioner then changed his story, stating that Bielby had told him the details about the pool cue. *Ibid.*

Petitioner said that he knew who had killed Shackleton, and he named one "Jeff Kaiser." AXs 38, 40; Tr. 961. Petitioner's basis for that opinion was that Kaiser did not go to the club for almost a month after the murder because Kaiser was scared and because he had been "doing acid" that night and may have done something he did not remember. *Ibid.* Petitioner finally said that if he had killed someone, he would have had to tell somebody. AX 40; Tr. 961.

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[6] Petitioner also used the bathroom once during the interview. J.A. 162.

The NIS agents then confronted petitioner with the fact that he *had* told someone, and that the person he had told had provided a sworn statement to NIS. J.A. 143. At that point, petitioner said, "I think I want a lawyer before I say anything else." The agents immediately terminated the interview. J.A. 136-137; see also AX 40; J.A. 133, 138-141, 143, 162-163.

2. Before trial, petitioner moved to suppress the statements he made to the NIS agents during the November 4 interview. AX 9, No. 20. The trial judge held an evidentiary hearing on the motion. The government's witnesses testified that petitioner had been properly advised of his rights; that during the questioning he made an ambiguous statement regarding counsel; that the NIS agents ceased their questioning once petitioner made that statement; that petitioner then denied wanting to speak with counsel; and that when petitioner later asked to speak to an attorney, all questioning ceased. Petitioner gave a different version of the events.[7]

---

[7] According to petitioner, the agents "were talking to me, and I said, 'Well, I'd like a lawyer,' and they said, 'We'll take a break,' and they walked out and left me handcuffed to the chair." J.A. 146. Petitioner said that later "[t]hey came back in and started questioning me again." *Ibid.* Petitioner indicated that, notwithstanding the fact that he understood he had a right to a lawyer, he did not pursue getting a lawyer when questioning began again because he "really did not understand * * * what was going on." J.A. 148. Petitioner stated that he asked for a lawyer again later using the same words, "I want a lawyer," at which time questioning stopped for the most part. J.A. 149. Based on that evidence, petitioner argued that the government had not established a valid waiver of rights at the outset of the interview and that he had requested and been denied counsel during the interview, in violation of *Edwards* v. *Arizona*, 451 U.S. 477 (1981). Tr. 338-340.

After the hearing, the trial judge denied petitioner's motion. Specifically, the trial judge determined (J.A. 164):

> I think that pursuant to Military Rule of Evidence 304 that the accused was properly advised of his rights pursuant to Article 31 and the cases of *Miranda* and [*United States* v.] *Tempia*, [37 C.M.R. 249 (1967),] and that he intelligently and freely waived those rights. Moreover, I find the mention of a lawyer by the accused during the course of the interrogation to have been not in the form of a request for counsel and that the agents properly determined that the accused was not indicating a desire for or invoking his right to counsel. * * * The motion to suppress the 4 November '88 statement is accordingly denied.

3. The Navy-Marine Corps Court of Military Review affirmed the findings and sentence. Pet. App. 12a-15a. Without comment, the court rejected the error raised here, among others, as meritless. *Id* at 15a.

4. The Court of Military Appeals affirmed, Pet. App 1a-11a, holding that "the limited results of the November 4 interview were properly admitted in evidence," *id.* at 9a. The court noted that the military judge had resolved against petitioner the conflict between the NIS agents' testimony and petitioner's, and that the judge's resolution of that factual issue was not clearly erroneous. *Ibid.*

With respect to the legal question whether petitioner's statement, "Maybe I should talk to a lawyer" invoked his right to counsel, the Court of Military Appeals held that the comment did not constitute an unequivocal request for counsel, and that the agents

therefore "properly conducted further limited questioning to clarify [petitioner's] ambiguous comment." Pet. App. 9a. Following the majority rule, the court held that when a suspect makes an ambiguous reference to counsel in the course of custodial interrogation, law enforcement authorities may make limited inquiries in order to "clarify[] the suspect's desires regarding counsel." *Id.* at 10a. The court emphasized that, in responding to an ambiguous reference to counsel, the authorities "may not attempt to persuade the suspect that counsel is not necessary or desirable, or presume to tell the suspect what counsel's advice is going to be." *Ibid.* Applying those principles to this case, the court found that the NIS agents' inquiries were appropriately limited to clarifying petitioner's ambiguous reference to counsel, and that their conduct did not interfere with petitioner's right to counsel under *Miranda*. *Id.* at 10a-11a.

SUMMARY OF ARGUMENT

I. The Court of Military Appeals correctly upheld the admission of the statements petitioner made after his ambiguous reference to counsel. Most courts have held that when a suspect makes an ambiguous reference to counsel during a custodial interview, law enforcement officers may ask questions to clarify the suspect's wishes. Under that approach, the limited inquiry made by the NIS agents to clarify petitioner's wishes regarding counsel was permissible, and the statements petitioner made after making clear that he did not want to consult with counsel at that time were therefore properly admitted.

A.1. The majority rule is consistent with the principles of *Miranda* v. *Arizona*, 384 U.S. 436

(1966), *Edwards* v. *Arizona*, 451 U.S. 477 (1981), and their progeny. The "fundamental purpose" of the prophylactic rules prescribed in *Miranda* and *Edwards* is to give a suspect the right to choose whether to have a lawyer present during custodial interrogation. *Connecticut* v. *Barrett*, 479 U.S. 523, 528 (1987). To carry out that purpose, law enforcement officers not only have to advise a suspect of his right to make a choice regarding the presence of counsel but also have to determine what choice the suspect has made. When a suspect makes an ambiguous reference to counsel, the only way for the officers to ascertain the suspect's wishes is to ask questions to clarify his meaning.

2. A rule permitting law enforcement officers to clarify a suspect's wishes with respect to the presence of counsel strikes an appropriate balance between the competing concerns underlying *Miranda* and *Edwards*. It recognizes that a suspect in custody may have difficulty expressing a desire for counsel with precision; accordingly, when the suspect makes an ambiguous reference to counsel, the officers may not simply disregard it, but must suspend the interrogation until they have resolved the ambiguity by clarifying the suspect's wishes. At the same time, the rule recognizes that, when a suspect makes an ambiguous reference to counsel, the officers should not be forced to terminate the interview altogether. If the suspect's wishes can be clarified by a few neutral questions, there is nothing coercive or otherwise improper about adopting that course. And if from that line of questioning it is clear that the suspect does not wish to invoke his right to counsel, the officers should be free to continue the interrogation.

3. The approach urged by petitioner would not provide a "brighter line" for the police or the courts to apply than the majority approach provides; in each case, a determination must be made whether the particular words used by the suspect are sufficient to require the interrogation to stop, either temporarily or for good. And either rule will be reasonably easy to apply in most cases, but will present difficulties in close cases. The difference between the rules is that petitioner's rule will result, in some cases, in denying the police an opportunity to obtain (or requiring the suppression of) statements from persons who did not, in fact, wish to invoke their right to counsel during questioning.

4. The other approaches that courts have taken to ambiguous references to counsel do not comport with the principles of *Miranda* and *Edwards*.

A few courts have required law enforcement officers to treat any reference by a suspect to counsel, however ambiguous, as a request for counsel. That approach cannot be justified on factual or legal grounds. It is wrong to assume that every suspect who makes a reference to a lawyer wishes to have a lawyer present during questioning. Nor is it appropriate to presume that the suspect means to invoke counsel in such cases, based on this Court's decisions regarding the standards applicable to waivers of the right to counsel. This case involves the question whether a suspect intends to invoke his right to counsel after previously waiving it; in that context, there is no reason to presume from any reference to a lawyer that the suspect intends to withdraw his waiver and invoke his right to counsel. It is reasonable in that context for the agents to seek, through

neutral questioning, to find out whether the suspect wants a lawyer or not.

The other approach that courts have taken to ambiguous references to counsel permits the police to continue an interrogation until the suspect makes an unambiguous request for counsel. That approach is inconsistent with the principles of *Miranda* and *Edwards*, because it creates an undue risk that suspects will be denied their right to have a lawyer present during custodial questioning, even after they have made an effort to invoke that right. Insisting on a clear and unambiguous statement from a suspect under the pressures of custodial interrogation would make the right to counsel depend not on the suspect's choice, but on the clarity with which he expresses that choice.

B. The lower courts were correct in treating petitioner's reference to a lawyer as ambiguous. The remark was sufficiently tentative in nature that it was not unreasonable for the NIS agents to cease their questioning and seek to determine whether petitioner's remark was intended as an invocation of his right to counsel. Nor was there anything improper about the agents' conduct of the brief session devoted to determining petitioner's wishes with regard to the presence of counsel. The agents did not suggest that petitioner should not request counsel, nor was there anything about their conduct that would have been interpreted as sending that message. In fact, they fully advised him that he had the right to request an attorney, and that if he did so they would not question him any further.

II. Even if it was error to admit the statements that petitioner made after his ambiguous reference to counsel, that error was harmless beyond a reasonable doubt. Petitioner's statements, which were contained in only half a page of the more than 700 pages of trial record, were in part simply a repetition of a statement he made earlier, and no part of his statement constituted an admission of guilt. The statements at issue in this case were inconsequential when compared to the overwhelming evidence of petitioner's guilt.

ARGUMENT

I. THE COURT OF MILITARY APPEALS CORRECTLY UPHELD THE ADMISSION OF THE STATEMENTS THAT PETITIONER MADE AFTER HIS AMBIGUOUS REFERENCE TO COUNSEL

A. Law Enforcement Officers May Ask Questions To Clarify A Suspect's Wishes When The Suspect Makes An Ambiguous Comment Regarding Counsel During A Custodial Interrogation

The lower federal and state courts have given three different answers to the question of how law enforcement officers should react when a suspect during custodial interrogation makes an ambiguous reference to counsel. Some courts require the officers to cease all questioning once a suspect refers to counsel, however ambiguous the reference may be.[8] Other courts have permitted the officers to continue an interrogation until the suspect makes an unambiguous request for counsel.[9] The third approach, which is

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[8] See *Maglio* v. *Jago*, 580 F.2d 202, 205 (6th Cir. 1978); *People* v. *Superior Court*, 542 P.2d 1390, 1394-1395 (Cal. 1975), cert. denied, 429 U.S. 816 (1976); *State* v. *Furlough*, 797 S.W.2d 631, 639 (Tenn. Crim. App. 1990).

[9] See *People* v. *Krueger*, 412 N.E.2d 57 (Ill. 1980); *Dean* v. *Commonwealth*, 844 S.W.2d 417, 420 (Ky. 1992), petition for cert. pending, No. 92-8835 (filed May 19, 1993); *Eaton* v. *Commonwealth*, 397 S.E.2d 385, 393-394 (Va. 1990).

followed by most courts, requires the officers to cease the interrogation when the suspect makes an ambiguous reference to counsel, but permits the officers to ask questions limited to clarifying the suspect's wishes regarding counsel.[10]

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[10] See, *e.g.*, *United States* v. *Porter*, 776 F.2d 370 (1st Cir. 1985) (en banc); *United States* v. *Gotay*, 844 F.2d 971, 975 (2d Cir. 1988); *Nash* v. *Estelle*, 597 F.2d 513, 517 (5th Cir.) (en banc), cert. denied, 444 U.S. 981 (1979); *United States* v. *D'Antoni*, 856 F.2d 975, 980-981 (7th Cir. 1988); *United States* v. *Nielson*, 392 F.2d 849, 853 (7th Cir. 1968); *United States* v. *Fouche*, 776 F.2d 1398, 1405 (9th Cir. 1985), appeal after remand, 833 F.2d 1284, 1287 (9th Cir. 1987), cert. denied, 486 U.S. 1017 (1988); *United States* v. *March*, 999 F.2d 456, 461-462 (10th Cir.), cert. denied, 114 S. Ct. 483 (1993); *United States* v. *Mendoza-Cecelia*, 963 F.2d 1467, 1472 (11th Cir.), cert. denied, 113 S. Ct. 436 (1992); *Hampel* v. *State*, 706 P.2d 1173, 1180 (Alaska Ct. App. 1985); *State* v. *Staatz*, 768 P.2d 143, 146 (Ariz. 1988); *People* v. *Benjamin*, 732 P.2d 1167, 1171 (Colo. 1987); *State* v. *Anderson*, 553 A.2d 589, 592-593 (Conn. 1989); *Crawford* v. *State*, 580 A.2d 571, 576-577 (Del. 1990); *Ruffin* v. *United States*, 524 A.2d 685, 700-702 (D.C. App. 1987); *Martinez* v. *State*, 564 So. 2d 1071, 1073-1074 (Fla. 1990); *Hall* v. *State*, 336 S.E.2d 812, 816-818 (Ga. 1985); *Carter* v. *State*, 702 P.2d 826, 832 (Idaho 1985); *Sleek* v. *State*, 499 N.E.2d 751, 754-755 (Ind. 1986); *People* v. *Giuchici*, 324 N.W.2d 593, 595 (Mich. Ct. App. 1982) (per curiam); *State* v. *Pilcher*, 472 N.W.2d 327, 332 (Minn. 1991); *Kuykendall* v. *State*, 585 So. 2d 773, 776-777 (Miss. 1991); *Sechrest* v. *State*, 706 P.2d 626, 630 (Nev. 1985); *State* v. *Gerald*, 549 A.2d 792, 831-832 (N.J. 1984); *Russell* v. *State*, 727 S.W.2d 573, 575-577 (Tex. Crim. App.), cert. denied, 484 U.S. 856 (1987); *State* v. *Sampson*, 808 P.2d 1100, 1108-1110 (Utah Ct. App. 1991); *State* v. *Robtoy*, 653 P.2d 284, 290 (Wash. 1982); *Cheatham* v. *State*, 719 P.2d 612, 618-619 (Wyo. 1986); *State* v. *Clawson*, 270 S.E.2d 659, 670 (W.Va. 1980); accord Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 6.9, at 129 (Supp. 1991).

This Court has previously noted the issue presented in this case, but has not had occasion to address it.[11] Nonetheless, the principles underlying this Court's decisions in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), *Edwards* v. *Arizona*, 451 U.S. 477 (1981), and their progeny strongly suggest that such clarifying questions are permissible.[12]

1. *A Rule Permitting Clarifying Questions Respects The Suspect's Right To Decide Whether To Have Counsel Present During Questioning*

Miranda prescribed a set of prophylactic rules the "fundamental purpose" of which is " 'to assure that *the individual's right to choose* between speech and silence remains unfettered throughout the interrogation process.' " *Barrett*, 479 U.S. at 528 (quoting, with emphasis, *Miranda*, 384 U.S. at 469). Those rules require law enforcement authorities to inform a suspect in custody, among other things, that he has

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[11] See *Connecticut* v. *Barrett*, 479 U.S. 523, 529-530 n.3 (1987); *Smith* v. *Illinois*, 469 U.S. 91, 95-96 & n.3 (1984) (per curiam); see also *Mueller* v. *Virginia*, 113 S. Ct. 1880 (1993) (White, J., dissenting from denial of certiorari).

[12] Although the Court in *Miranda* did not resolve the question presented in this case, the Court recognized the likelihood that in some cases a suspect's invocation of his rights would be equivocal. The Court cited with approval the practice of the FBI relayed to the Court in a letter from Solicitor General Thurgood Marshall: "If [the suspect] is indecisive in his request for counsel, there may be some question on whether he did or did not waive counsel. Situations of this kind must necessarily be left to the judgment of the interviewing Agent." 384 U.S. at 385; see also *Anderson* v. *Smith*, 751 F.2d 96, 103 (2d Cir. 1984) ("*Miranda* itself approved such clarifying questions.").

the right to remain silent and to have an attorney present during questioning. *Miranda*, 384 U.S. at 444. *Edwards* prescribed an additional set of rules for cases in which the suspect invokes the right to counsel under *Miranda*. The Court in *Edwards* held that, following such a request, the suspect "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." 451 U.S. at 484-485; see also *Wyrick* v. *Fields*, 459 U.S. 42 (1982) (per curiam). Thus, *Miranda* imposes on police the duty to inform a suspect that he may choose between answering questions and remaining silent, and between having counsel present during questioning and proceeding without counsel. *Edwards* imposes an additional duty on the authorities that ensures that they respect the suspect's choice regarding counsel. *Moran* v. *Burbine*, 475 U.S. 412, 420 (1986).[13]

[13] The federal statute providing that in "any criminal prosecution brought by the United States" a confession "shall be admissible if it is voluntarily given," 18 U.S.C. 3501(a), is not at issue in this case. It was not raised below, and in any event would appear not to be applicable in court-martial cases. Court-martial cases are not "criminal prosecutions" within the meaning of the Sixth Amendment, see *Whelchel* v. *McDonald*, 340 U.S. 122, 127 (1950); *Ex parte Quirin*, 317 U.S. 1, 40 (1942); *Kahn* v. *Anderson*, 255 U.S. 1, 8 (1921), and they therefore would not appear to be "criminal prosecution[s]" for purposes of Section 3501(a). In any event, the admissibility of statements by suspects following violations of the rules of *Miranda* and *Edwards* is governed by Article 31 of the Uniform Code of Military Justice, 10 U.S.C. 831, and Rules 304 and 305 of the Military Rules of Evidence. Rule 305 guarantees a suspect the right to counsel at a custodial interrogation, and Rule 304 requires suppression of evidence obtained in violation of that right.

In keeping with the fundamental purpose of protecting the suspect's choice whether to have counsel present during custodial questioning, the *Edwards* rule is not "triggered automatically by the initiation of the interrogation itself." *Moran*, 475 U.S. at 433 n.4. Rather, "as both *Miranda* and subsequent decisions construing *Miranda* make clear beyond refute, 'the interrogation must cease until an attorney is present' *only* '[i]f the individual states that he wants an attorney.'" *Moran*, 475 U.S. at 433 n.4 (quoting, with emphasis, *Michigan* v. *Mosley*, 423 U.S. 96, 104 n.10 (1975) (quoting *Miranda*, 384 U.S. at 474)). Thus, a basic requirement for application of the *Edwards* rule is that the accused must "actually invoke[] his right to counsel" by "stating that he wants an attorney." *Smith* v. *Illinois*, 469 U.S. at 95; see also *Minnick* v. *Mississippi*, 498 U.S. 146, 147 (1990) ("the police must terminate interrogation of an accused in custody if the accused requests the assistance of counsel"); *Solem* v. *Stumes*, 465 U.S. 638, 641 (1984) ("once a suspect has invoked the right to counsel, any subsequent conversation must be initiated by him").

In light of those principles, the proper response by law enforcement officers to a suspect's ambiguous reference to counsel must be to preserve the suspect's right to choose whether to have counsel present during questioning. The only way for the officers to preserve that choice is to determine whether the suspect actually wishes to have counsel present during any custodial questioning, which may not be obvious from

the suspect's words or actions without further inquiry.

Any other response would "require authorities to ignore the tenor or sense of a [suspect's] response to th[e] [*Miranda*] warnings." *Barrett*, 479 U.S. at 528. If, for example, the officers presume that any reference to counsel, however vague or equivocal, is a request for counsel, they may be making a decision for the suspect that the suspect has not made on his own. If, on the other hand, they continue interrogating a suspect, despite an ambiguous reference to counsel, they may be overriding the suspect's desire to have counsel present simply because he has not made the request with sufficient precision.

To fulfill the "fundamental purpose" of *Miranda*, a law enforcement officer may not rely on a presumption in either direction regarding a suspect's choice between going forward with a lawyer or proceeding without one. Cf. *McNeil* v. *Wisconsin*, 111 S. Ct. 2204, 2209 (1991) ("the *likelihood* that a suspect would wish counsel to be present is not the test for applicability of *Edwards*"). Instead, the officer must determine what choice the suspect has actually made, and to make that determination the officer must be able to ask clarifying questions.

2. *A Rule Permitting Clarifying Questions Comports With The Balance Of Interests Struck In* Miranda *and* Edwards

The rules enunciated in *Miranda* and *Edwards* are designed to strike an appropriate balance between the competing concerns implicated by custodial interrogation. *Moran*, 475 U.S. at 426. A rule permitting law enforcement officers to clarify a suspect's ambiguous reference to counsel preserves, rather than upsets, that balance.

This Court has explained that "custodial interrogations implicate two competing concerns" that *Miranda* attempted to reconcile." *Moran*, 475 U.S. at 426. "On the one hand, 'the need for police questioning as a tool for effective enforcement of criminal laws' cannot be doubted.' " *Moran*, 475 U.S. at 426 (quoting *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 225 (1973)). "Admissions of guilt are more than merely 'desirable'; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran*, 475 U.S. at 526 (quoting *United States* v. *Washington*, 431 U.S. 181, 186 (1977)); see *McNeil*, 111 S. Ct. at 2210. On the other hand, "the Court has recognized that the interrogation process is 'inherently coercive' and that, as a consequence, there exists a substantial risk that the police will inadvertently traverse the fine line between legitimate efforts to elicit admissions and constitutionally impermissible compulsion." *Moran*, 475 U.S. at 426. A rule permitting the police to clarify a suspect's ambiguous reference to counsel strikes a proper balance between those concerns by giving the suspect "the power to exert some control over the course of the interrogation," *ibid.*, without unduly impeding "legitimate law enforcement [activities]," *id.* at 427.

The rule permitting clarifying questions recognizes that some suspects in custody may want counsel but be unable to articulate their wishes clearly. Under the rule, the suspect does not have to say that he wants an attorney in clear and unequivocal terms in order to cut off the interrogation. An ambiguous or equivocal reference suffices to stop the interrogation until the suspect's wishes are clarified. Thus,

the suspect has the burden of making his wishes known, but that burden must be viewed in light of the inarticulateness of some suspects and the pressures generated by a custodial setting. See *Miranda*, 384 U.S. at 445-458.

The rule permitting clarifying questions must, of course, be administered to avoid the risk of police badgering, the concern that underlies the bright-line rule of *Edwards*. See *McNeil*, 111 S. Ct. at 2208; *Minnick*, 498 U.S. at 150; *Michigan* v. *Harvey*, 494 U.S. 344, 350 (1990); *Oregon* v. *Bradshaw*, 462 U.S. 1039, 1044 (1983) (plurality opinion). Once a suspect has made an ambiguous reference to counsel, the officers may ask only questions designed to ascertain the suspect's wishes. The officers may not ask questions about the offense under investigation. Nor may they seek to dissuade the suspect from requesting a lawyer.[14] The questions must be objectively neutral and limited to ascertaining, not influencing, the choice that the suspect is entitled to make freely under *Miranda* and *Edwards*. See, *e.g.*, *United States* v. *Cherry*, 733 F.2d 1124, 1130-1131 (5th Cir. 1984); *Thompson* v. *Wainwright*, 601 F.2d 768, 771-772 (5th Cir. 1979); *Crawford* v. *State*, 580 A.2d 571, 577 (Del. 1990); see also *Towne* v. *Dugger*, 899

[14] An officer is not permitted, in our view, to state or suggest that the suspect does not really need an attorney. Thus, we think that the officer's response to the suspect's ambiguous reference to counsel in *Mueller* was improper. 113 S. Ct. at 1880 (when suspect asked officer "Do you think I need an attorney here?", officer "responded by shaking his head from side to side, shrugging, and stating: 'You're just talking to us' ").

F.2d 1104, 1109 (11th Cir.), cert. denied, 498 U.S. 991 (1990).[15] As one court put the point succinctly:

> The pragmatic approach occupies a sensible middle ground between, on one hand, giving 'talismanic effect' to any vague mention of an attorney and, on the other hand, insisting that accused persons in custody invoke their rights in language free from all possible ambiguity. This approach protects the accused person without unduly interfering with reasonable police questioning.

State v. *Moulds*, 673 P.2d 1074, 1082 (Idaho Ct. App. 1983).

3. *A Rule Permitting Clarifying Questions Provides A Bright Line For Police And Courts To Follow*

One of the principal purposes of the rules fashioned in *Miranda* and *Edwards* was to "inform[] police and prosecutors with specificity as to what they must do in conducting custodial interrogations, and [to] * * * inform[] courts under what circumstances statements obtained during such interrogation are not admissible." *Arizona* v. *Roberson*, 486 U.S. 675, 681 (1988). A rule permitting law enforcement officers to clarify a suspect's ambiguous reference to counsel offers sufficiently clear direction to courts and police to satisfy that important feature of *Miranda* juris-

[15] Contrary to petitioner's assertion (Pet. Br. 25, 28), clarifying questions are not likely to be perceived by the suspect as "badgering." On the contrary, it is more likely that such questions, like the *Miranda* warnings themselves, will indicate to the suspect that the police recognize and are prepared to honor his right to counsel. Cf. *Miranda*, 384 U.S. at 468.

prudence. See *United States* v. *Gotay*, 844 F.2d at 975.

An important feature of the rule permitting clarifying questions is that it relieves the police officer of the need to speculate about the suspect's wishes in cases in which there may be doubt whether the suspect has meant to invoke his right to counsel. Regardless of where a particular court draws the line, there will always be cases in which it is difficult to know whether what the suspect has said is enough to constitute an invocation of counsel under *Edwards*. The "clarification" rule has the simple virtue of permitting the officer to solve that dilemma by seeking further information to ascertain the suspect's choice. In most cases, that information can be obtained through a few simple questions that should not be difficult to formulate. Such "[c]larification efforts will more often than not settle matters—and settle them correctly." J. Tomkovicz, *Standards for Invocation and Waiver of Counsel in Confession Contexts*, 71 Iowa L. Rev. 975, 1016 n.159 (1986).[16]

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[16] Petitioner suggests, Br. 30-33 & n.33, that by avoiding the need for clarifying questions, his standard provides a "bright line" rule that will be easy to apply and will eliminate "disputes over simple historical facts and facilitate appellate review." *Id.* at 33 n.33. But courts will always have to resolve factual disputes about what was said during the interrogation. Petitioner recognizes as much, as he admits in a footnote that, even under his standard, agents would be permitted to ask clarifying questions in some cases, although he would characterize the class of such cases as those in which "it is possible, but unlikely that a suspect is requesting counsel." Pet. Br. 33 n.34. By acknowledging that there will be ambiguity (and the need for clarification) under his standard as well, petitioner essentially concedes that his test does not provide any brighter line than the majority test—it simply moves the line.

In those cases that give rise to litigation, courts will have to decide two questions, both of which entail relatively straightforward, objective inquiries. The first is whether a suspect's reference to counsel was ambiguous. See, *e.g.*, *United States* v *Mendoza-Cecelia*, 963 F.2d 1467, 1472 (11th Cir.) (applying objective standard to determine whether suspect's reference to counsel was ambiguous) cert. denied, 113 S. Ct. 436 (1992). That question, of course, must be addressed under any approach for dealing with ambiguous references to counsel. See *People* v. *Benjamin*, 732 P.2d 1167, 1170 (Colo. 1987) ("Whatever the standard might be, it is apparent that '[o]n occasion, an accused's asserted request for counsel may be ambiguous or equivocal.'") (quoting *Smith*, 469 U.S. at 95)). The second question, which arises only if the court determines that a reference to counsel is ambiguous, is whether the officer's subsequent questions to the suspect were limited to clarifying the suspect's wishes regarding the presence of counsel during questioning. Although that question may be difficult to answer in some cases, it is not analytically complicated and does not detract significantly from the "bright line" character of the majority rule. See *United States* v. *D'Antoni*, 856 F.2d 975, 890-981 (7th Cir. 1988) (applying objective standard to determine whether officer's questioning was clarification or further interrogation).

4. *Other Approaches To A Suspect's Ambiguous Reference To Counsel Do Not Comport With The Balance Underlying* Miranda *and* Edwards

A few courts have held that the police must stop all questioning when a suspect refers to counsel, how-

ever ambiguous the reference may be. Under that approach, any reference to a lawyer is deemed a request for counsel. The other minority approach permits the police to continue an interrogation until the suspect makes an unambiguous request for counsel. Under that approach, ambiguous references to counsel are ignored. Neither approach strikes the proper balance between the concerns underlying *Miranda* and *Edwards*.

a. The approach under which virtually any reference to a lawyer is deemed a request for counsel "would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity," *Mosley*, 423 U.S. at 102, because it would needlessly prevent the police from questioning a suspect in the absence of counsel even if the suspect did not wish to have a lawyer present. See *United States* v. *Gotay*, 844 F.2d at 975.

As a factual matter, it is a mistake to assume that every suspect's ambiguous reference to an attorney indicates a desire to deal with the police only through a lawyer. As the en banc Fifth Circuit has observed,

> [w]hile the suspect has an absolute right to terminate station-house interrogation, he also has the prerogative to then and there answer questions, if that be his choice. Some persons are moved by the desire to unburden themselves [by] confessing their crimes to police, while others want to make their own assessment of what to say to their custodians.

Nash v. *Estelle*, 597 F.2d 513, 517 (5th Cir.) (en banc), cert. denied, 444 U.S. 981 (1979). An approach that ignores the suspect's choice to proceed without a lawyer effectively "deprive[s] suspects of

an opportunity to make informed and intelligent assessments of their interests." *Mosley*, 423 U.S. at 102; see also *id.* at 109 (White, J., concurring) (the Court has "rejected any paternalistic rule protecting a defendant from his intelligent and voluntary decisions about his own case"); cf. *Minnick*, 498 U.S. at 155 ("Both waiver of rights and admission of guilt are consistent with the affirmation of individual responsibility that is a principle of the criminal justice system.").

Petitioner argues (Pet. Br. 23-24) that a rule deeming any reference to a lawyer to be a request for counsel is supported by this Court's cases holding that a waiver of the right to counsel will not be recognized unless the waiver is clear and unequivocal. See *Michigan* v. *Jackson*, 475 U.S. 625, 633 (1986) (doubts will be resolved against finding waiver of Sixth Amendment right to counsel). In this case, however, petitioner had already waived his right under *Miranda* to have counsel present during questioning; the only question raised by his reference to a lawyer was whether he had decided to change his mind and invoke that right instead. As this Court has explained, the rule of *Edwards* "embodies two distinct inquiries": first, whether a suspect has "actually invoked his right to counsel * * * in the first instance"; and, second, whether, having invoked his right to counsel, the suspect subsequently waived it. *Smith*, 469 U.S. at 95; see also *McNeil*, 111 S. Ct. at 2209. By analogy, a case such as this one involves two equally distinct inquiries: whether the defendant initially waived his right to counsel, and whether, having waived that right, he has actually invoked the right and effectively withdrawn his waiver. Once the suspect has validly waived counsel—and petitioner did

so at the outset of the November 4 interview—it is reasonable for the police (and the courts) to rely on that waiver until it is reasonably apparent that the suspect has changed his mind. And in order to determine whether he has changed his mind, the interrogating officer should be permitted to ask questions directed to that issue.

A rule deeming any reference to a lawyer to be a request for counsel is not justified by the need for a "bright line" rule to guide law enforcement officers and courts. While such a rule might be easy to apply, it would also lead to absurd results. It would, for example, seem to require the police to stop an interrogation if a suspect with poor hearing asks an officer to repeat the *Miranda* warning "about having a lawyer." It is therefore not surprising that even petitioner ultimately eschews such a rule, conceding (Pet. Br. 22) that "not every reference to an attorney by a suspect in custody requires that questioning cease." Yet petitioner's contention that an ambiguous reference to counsel should be construed as a request for counsel if it "would be understood by ordinary people as a request for counsel" (*id.* at 16) does not provide any "brighter line" than that afforded under the majority approach that we urge the Court to adopt.[17] The effect of adopting petitioner's

[17] The difference between the definition of ambiguity that we advocate and that urged by petitioner is somewhat subtle, but it is important. Under the rule for which we contend, a reference to counsel would be considered ambiguous if the statement, objectively viewed, did not make clear the suspect's desire to consult with an attorney before further questioning. Petitioner would define a statement as unambiguous if "ordinary people could reasonably understand" the statement, in context, as a request for counsel. Pet. Br. 11. While that standard is less extreme than the standard that requires termination of interrogation upon any reference to a lawyer at all, it is still significantly broader than the majority rule for which we argue, and it relies on a strained use of the term "unambiguous." It is contrary to the normal use of that term to characterize as "unambiguous" a statement that others "could reasonably understand" to have a particular meaning. Under our standard, a reference to counsel is ambiguous if it is unclear whether it was intended to constitute an invocation of the right to counsel. Under petitioner's standard, a reference to counsel is ambiguous only if it could *not* reasonably by understood to constitute an invocation of the right to counsel. In addition, there is a circularity to petitioner's argument on this point: He suggests (Br. 22) that because the NIS agents stopped questioning petitioner and sought to clarify his reference to a lawyer, they must have understood his comment as a request for counsel. But if that is the test, clarifying questions will never be permitted, because asking such questions will be interpreted as an admission by the officers that they understood the defendant's remark to be an invocation of counsel, which in turn would require them to terminate the interview altogether.

rule forbidding any clarifying questions, however, would be that in a number of cases, confessions could not be elicited, or would have to be suppressed, even though the suspect never actually wanted to consult with counsel at all. In the criminal justice system, which depends so much on admissions of guilt, such a result would exact a huge price while producing no appreciable benefit in return.

b. The approach that permits law enforcement officers to continue an interrogation until the suspect has made an unambiguous request for a lawyer is equally at odds with the principle of "free choice" that underlies *Miranda* and *Edwards*. Permitting officers to ignore any request for counsel but one articulated in precisely the right terms poses an un-

due risk of discouraging suspects from exercising their right to have a lawyer present during questioning. For example, if a suspect says to a law enforcement officer, "Don't you think I should get a lawyer?", the ambiguity created by the fact that the statement is phrased as a question should not justify the interrogating officer's ignoring the question and continuing to interrogate the suspect about the offense under investigation.[18] Instead, in order to protect the suspect's right to have counsel present before further interrogation, the police should have to interrupt the interrogation at that point to determine whether the suspect wishes to invoke his right to counsel under *Miranda*.

B. The NIS Agents Did Not Interfere With Petitioner's Right To Counsel Under *Miranda* and *Edwards*

1. *Petitioner's Reference To Counsel Was Ambiguous*

Petitioner argues at some length (Pet. Br. 13, 15-23) that his statement "Maybe I should talk to a lawyer" was not ambiguous. This Court should decline to address that argument, because it is not fairly included within the question as to which this Court granted certiorari. See Rule 14.1(a) of the

[18] Of course, not every mention of the word "lawyer" rises to the level of an ambiguous or equivocal reference that could be intended as an invocation of the right to counsel. Thus, if a suspect said, "My lawyer told me that they can't convict you of bank robbery if you don't actually go into the bank," the reference to a lawyer would not even arguably suggest an intention to invoke counsel. In that setting, we submit, there would be no obligation on the part of the police to suspend questioning for clarification of the suspect's wishes.

Rules of this Court; see also, *e.g.*, *Izumi Seimitsu Kogyo Kabushini Kaisha* v. *U. S. Philips Corp.*, 114 S. Ct. 425 (1993) (per curiam). The question set forth in the petition for a writ of certiorari assumes that petitioner's reference to counsel was ambiguous. Pet. i ("When a suspect makes an *ambiguous* request for counsel during a custodial interrogation, must the interrogator cease questioning until the suspect is provided with counsel?") (emphasis added). Petitioner therefore should not be entitled to contend otherwise now.

In any event, the Court of Military Appeals was correct in concluding that petitioner's reference to counsel was ambiguous. Pet. App. 10a. Petitioner concedes that "the word 'maybe' reflects some ambiguity." Pet. Br. 15 n.19.[19] Contrary to petitioner's contention (*id.* at 11), the supposedly "coercive" context in which the statement was made did not "dis-

[19] Contrary to petitioner's suggestion (Pet. Br. 23 n.25), numerous courts have held that references to counsel substantially similar to his are ambiguous. See *United States* v. *Mendoza-Cecelia*, 963 F.2d 1467, 1471 (11th Cir. 1992) ("I don't know if I need a lawyer—maybe I should have one, but I don't know if it would do me any good at this point."), cert. denied, 113 S. Ct. 483 (1993); *Robtoy* v. *Kincheloe*, 871 F.2d 1478, 1479 (9th Cir. 1989) ("maybe I should call my attorney"), cert. denied, 494 U.S. 1031 (1990); *Smith* v. *Endell*, 860 F.2d 1528, 1531 (9th Cir. 1988), cert. denied, 498 U.S. 981 (1990); *United States* v. *Cherry*, 733 F.2d 1124, 1127 (5th Cir. 1984) ("Maybe I should talk to an attorney."); *State* v. *Staatz*, 768 P.2d 143, 145 (Ariz. 1988) (en banc) ("Maybe I should be talking to a lawyer"; "Maybe it would be in my best interests to speak to a lawyer."); *State* v. *Moulds*, 673 P.2d 1074 (Idaho Ct. App. 1983) ("Maybe I need a lawyer."); *People* v. *Krueger*, 412 N.E.2d 537, 538 (Ill. 1980) ("Maybe I ought to have an attorney"; "Maybe I need a lawyer"; "Maybe I ought to talk to a lawyer.").

pel[]" that ambiguity. As discussed above, that statement was made after petitioner had been given *Miranda* warnings both orally and in writing and had signed a form that stated:

> I understand my rights as related to me and as set forth above. With that understanding, I have decided that I do not desire to remain silent, consult with a retained or appointed lawyer, or have a lawyer present at this time. I make this decision freely and voluntarily. No threats or promises have been made to me.

J.A. 170 (AX 37); see also J.A. 118-119, 151-152, 175 (AX 40). Petitioner does not dispute that he was adequately advised of his rights under *Miranda* and *Edwards* and that he understood them. Nor does he contend that the NIS agents who questioned him did anything improper between the time they advised him of his rights and the time he made the reference to counsel at issue here.[20] The agents' compliance with the procedural safeguards in *Miranda* and *Edwards* prior to that reference "dissipated" any coercive pressures generated by the custodial setting. See *Moran*, 475 U.S. at 425.

2. *The NIS Agents Properly Limited Their Inquiries Concerning Petitioner's Ambiguous Reference To Counsel*

The Court of Military Appeals correctly held that the NIS agents stayed within proper limits following petitioner's ambiguous reference to counsel. Pet.

[20] Petitioner suggests (Pet. Br. 36) that the agents should have instructed him "that there was nothing improper about [a] request for an attorney." Petitioner does not cite any legal support for adding such an instruction to the *Miranda* warnings.

App. 10a-11a. Petitioner's arguments to the contrary are unpersuasive.

Petitioner relies primarily (Pet. Br. 34-36) on the agents' statement to him that they were not there to violate his rights. Petitioner admits that the agents' statement was "perhaps literally true." Pet. Br. 34. He nonetheless contends that the statement was misleading because "the Agents were not there to protect his rights either." *Ibid.*

The statement cited by petitioner was not misleading. It implied no more than was implied by giving the *Miranda* warnings in the first place: that the agents were aware of, and intended to honor, petitioner's rights. *Miranda*, 384 U.S. at 468. Moreover, the statement was plainly innocuous, considered in context. Immediately after the agents made the statement, they told petitioner that if he wanted a lawyer, they would "stop any kind of questioning of him," and that they merely wanted to "have it clarified is he asking for a lawyer." J.A. 136.

Petitioner also argues (Pet. Br. 37) that the "military environment in which the interrogation took place * * * undermined the voluntariness of [his] waiver of his right to counsel." That argument is premised on his assertion (*id.* at 38-39) that "a servicemember's right to counsel must be guarded in ways unnecessary for civilians." This Court has made clear, however, that the rules of *Miranda* and *Edwards* do not operate differently in the military setting. See *Wyrick*, 459 U.S. at 48-49; see also *United States* v. *Tempia*, 37 C.M.R. 249 (C.M.A. 1967).

Finally, petitioner contends (Pet. Br. 39-41) that his psychiatric condition made him particularly susceptible to official overreaching. But there was no

overreaching by the NIS agents, either as found by any court below or as disclosed by the evidence. The agents simply inquired as to petitioner's wishes and then, after a break, resumed the questioning when petitioner indicated clearly that he did not wish to have counsel present during questioning.

Petitioner does not suggest that he was unable to understand his rights because of a lack of education (he had a high school education (Defendant's Exhibit R)) or a mental illness (he was diagnosed as having "ineffective individual coping skills," AX 51, at 3, and an antisocial personality, PX 63). Nor does he suggest that he was somehow unable to exercise the choice to have counsel, once that choice was explained to him. Under those circumstances, the court of appeals properly concluded that petitioner's waiver of the right to counsel under *Miranda* and *Edwards* was both knowing and voluntary.

II. EVEN IF IT WAS ERROR TO ADMIT THE STATEMENTS MADE BY PETITIONER AFTER HIS AMBIGUOUS REFERENCE TO COUNSEL, THAT ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT

Any error in the admission of the statements petitioner made after his ambiguous reference to counsel was harmless beyond a reasonable doubt. See *Sullivan* v. *Louisiana*, 113 S. Ct. 2078, 2081, 2083 (1993); *Arizona* v. *Fulminante*, 499 U.S. 279, 306-312 (1991). The Court of Military Appeals therefore correctly upheld petitioner's conviction.

The statements that followed petitioner's ambiguous reference to a lawyer were inconsequential. After that point in the questioning, petitioner merely repeated what he had previously told the NIS agents

about his October 5 conversation with Petty Officer Guidry regarding the way Shackleton had died. In addition, petitioner asserted that "Jeff Kaiser" had killed Shackleton. See AX 38, 40; Tr. 961.

Those remarks were only mildly incriminating, and they occupied less than half a page of testimony in a trial record more than 700 pages in length. The statements were particularly insignificant when compared to the powerful evidence of petitioner's guilt adduced through other evidence at trial. The government presented five witnesses who placed both petitioner and Shackleton at the Enlisted Men's Club on the night of the murder. Tr. 579-585, 606-607, 619-620, 639-641, 648. Forensic evidence also tied petitioner to the crime. A forensic chemist testified that petitioner's blood type was B and that Shackleton's was O. PX 21; Tr. 907, 914. The chemist found blood of the victim's type on petitioner's pants and spots of blood on petitioner's tennis shoes. PX 23; Tr. 911-912. A human blood stain also was found on petitioner's pool cue case. PX 21; Tr. 906. Moreover, at various times petitioner made statements to fellow sailors in which he either specifically admitted assaulting Shackleton or otherwise implicated himself in that crime. Lieutenant Moss and Petty Officers Guidry, Stephen Brothers, Scott Richard Kuhn, and Walter Crayton Black recounted petitioner's various incriminating statements. Petty Officer Ronald Mull also retold petitioner's confession in which he admitted murdering Shackleton because Shackleton had reneged on a wager. Tr. 702, 707-708, 714, 728, 746-747, 1103. And finally, in a portion of the NIS interviews not challenged here, petitioner made false exculpatory statements to the NIS agents when he said that he had learned about the facts of the crime from Everett

Wade Bielby and Bonnie Krusen, neither of whom spoke with petitioner during the relevant period, and when he said that he had spent the night of the murder with his girlfriend, who denied that claim. Tr. 852-853, 855, 957-958.

The evidence at the court-martial proceeding thus overwhelmingly established that petitioner beat Keith Shackleton with a pool cue, causing him to fall and suffer fatal head injuries. Admission of the few statements obtained after petitioner's comment about counsel could not have had a material effect on the outcome of petitioner's trial.

CONCLUSION

The judgment of the Military Court of Appeals should be affirmed.

Respectfully submitted.

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No. 92-1949

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ROBERT L. DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

REPLY BRIEF

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INTRODUCTION

The proper standard for evaluating whether an ambiguous request invokes the right to counsel under *Miranda v. Arizona*, 384 U.S. 436 (1966), asks whether a statement made by a suspect during custodial interrogation could reasonably be understood, in context, as a request for counsel. If so, an ambiguous request should be deemed sufficient to invoke the right to counsel, thus triggering the rule of *Edwards v. Arizona*, 451 U.S. 477 (1981). If the statement can not reasonably be understood in context as a request for counsel, the rule of *Edwards* should not apply. This bright line rule would obviate the need for any clarification.

ARGUMENT

Although the government repeatedly characterizes Petitioner's statement "[m]aybe I should talk to a lawyer" as an "ambiguous reference to counsel," Gov't Br. 15, 19, Petitioner's statement was more than a mere reference to counsel. It expressed a desire to communicate with an attorney. Accordingly, the Petition for *Certiorari* did not ask the Court to review the significance of an ambiguous reference to an attorney. The issue is not whether any passing *reference* to lawyers should be given a talismanic effect; even if clearly expressed, a mere reference to a lawyer does not invoke the right to counsel. Rather, the question presented concerns the legal significance of a suspect's ambiguous *request* for counsel.

Under Petitioner's proposed standard, a suspect's ambiguous statement is sufficient to invoke the right to counsel if it could reasonably be understood, when viewed in context, as a request for counsel. This standard appreciates that statements may be sufficiently ambiguous such that reasonable people could differ concerning whether the suspect intended to invoke the right to counsel. Petitioner's proposed standard considers the inherently coercive context in which such statements are made, and also recognizes the imprecision of common, everyday speech.[1]

By contrast, the government would require that a suspect make his or her desire to consult with counsel "clear," and therefore unmistakable, before the suspect's statement would be considered sufficient to invoke the right to counsel under *Edwards*. Gov't Br.

[1] The government's suggestion that Petitioner has argued that his statement was not ambiguous, Gov't Br. at 30, is not supported in Petitioner's Brief. Petitioner conceded that the statement "[m]aybe I should talk to a lawyer" was ambiguous. Pet. Br. at 15 & n. 19. Though ambiguous by definition, when placed in context and evaluated under the proper legal standard, the statement was sufficient to invoke the right to counsel.

at 28 n.17.[2] Failing such clarity, however, the government would allow the police to question a suspect about whether he or she actually intended to invoke the right to counsel.[3] Such an approach is inconsistent with *Miranda*.

A. A Suspect Experiencing The Pressures Of Custodial Interrogation Should Not Be Required To Express The Desire To Consult An Attorney In Clear And Unmistakable Terms Before Being Afforded The Right.

Even as it advocates a standard requiring that a suspect's invocation of the right to counsel be unmistakably clear, the government recognizes the inherent unfairness of such a rule:

> Insisting on a clear and unambiguous statement from a suspect under the pressures of custodial interrogation would make the right to counsel depend not on the suspect's choice, but on the clarity with which he expresses that choice.

Gov't Br. at 14. The government's proposed rule permitting clarification where a suspect's statement is less than clear conflicts with the government's professed desire to protect the suspect's right to choose between speaking to police and consulting with counsel.

[2] The opportunity for a suspect to demonstrate such "clarity" would only come to pass if the interrogators decide that there was sufficient ambiguity in the request *ab initio*. Only then would the government clarify the request. Thus, the government standard really requires suspects to potentially leap two hurdles prior to effective invocation.

[3] The government argues "not every mention of the word 'lawyer' rises to the level of an ambiguous or equivocal reference that could be intended as an invocation of the right to counsel." Gov't Br. at 30 n.38. While Petitioner maintains that clarification is never appropriate, Petitioner agrees that not every passing reference to an attorney invokes the right to counsel. Pet. Br. at 22. A statement that could reasonably be viewed as an ambiguous request, however, should be sufficient to invoke the right to counsel.

A suspect attempting to invoke the right to counsel may use terms that are not clear and unambiguous, either because the suspect's language skills do not permit such clarity of expression or because his social and cultural background have not inculcated the assertiveness the government standard would require. The government even concedes that this "burden must be viewed in light of the inarticulateness of some suspects and the pressures generated by a custodial setting." Gov't Br. at 22. Under the government's proposed standard, however, such a suspect will face clarifying questions from police officers. Thus, the government's proposed rule would, in essence, carve out an exception to the *Edwards* rule and allow police officers to continue to question suspects whose language skills do not break the threshold of clarity advocated by the government. Such a position is entirely at odds with *Miranda* and *Edwards*.

In essence, the government advocates a rule which subjects the least assertive suspect to greater pressure than the more assertive suspect. Petitioner's standard takes into consideration the fact that all suspects are not created equal. Suspects who are more assertive, intelligent, or experienced at undergoing interrogation may find it easy to forcefully assert their right to counsel. But the timid, less intelligent suspect may be cowed by his or her first exposure to custodial interrogation. That suspect may express the desire for counsel in terms an experienced interrogator may find ambiguous.

The facts in this case demonstrate why a standard requiring a clear and indisputable request for a lawyer to invoke the right to counsel under *Edwards* requires too much of the less-than-stalwart suspect in the heat of custodial interrogation. A low ranking enlisted man in the Navy, Petitioner was questioned by NIS Agents whose investigation had received close cooperation from Petitioner's command, even to the point—as Petitioner knew—that the Agents enjoyed access to the Admiral's stateroom. After more than a week in isolation in a psychiatric ward—where his treating physician happened to be the husband of the lead NIS Agent—Petitioner was arrested by the NIS Agents and taken to

the base NIS office. He was then handcuffed to a chair and interrogated.[4] After an hour of questioning, the NIS Agents confronted Petitioner with questions suggesting that he had murdered Keith Shackleton. They then made very pointed inquiries concerning the bloody T-shirt in his locker.

At this critical point, after he explained that the blood on the T-shirt was the result of the extraction of his wisdom teeth, J.A. 176, Petitioner interrupted the interrogation and stated, "[m]aybe I should talk to a lawyer." J.A. 135, 140, 152, 176. Perhaps ambiguous in the abstract, the words should be sufficient to invoke the right to counsel. The law should not require a homicide suspect, who had been arrested after being kept in isolation in a psychiatric ward for more than a week and was kept handcuffed to a chair, to speak with any greater clarity or force in order to invoke the right to counsel under *Miranda* and *Edwards*. Moreover, Petitioner's use of common hedge words or tag phrases such as "maybe" and "I think" should not undermine the validity of an invocation of the right to counsel.[5]

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[4] The government makes much of Petitioner's initial waiver of his right to counsel, Gov't Br. at 27-28, and implies that Petitioner should therefore have to leap a higher hurdle to invoke the right to counsel should he subsequently decide to do so. Petitioner disagrees with the government's suggestion, and is unaware of any authority that supports the government's proposition. If anything, the fact that Petitioner had at first ostensibly waived his right to counsel suggests that his subsequent statement "[m]aybe I should talk to a lawyer" reflected a change of mind about the need for counsel.

[5] The government argues that it is circular to look to the Agents' treatment of Petitioner's statement as evidence that they understood it as a request for counsel. *See* Gov't Br. at 28 n.37. Petitioner's argument, Pet. Br. at 22-23, however, was broader than the government has characterized it. The Agents' subsequent treatment of the functionally identical statement, "I think I want a lawyer before I say anything else," J.A. 137, shows that the only difference between the two statements was not some metaphysical distinction between one level of ambiguity and another. Instead, the critical difference was that the Agents no longer believed it possible for Petitioner

The government also fails to appreciate—and therefore dismisses the significance of—the military setting within which Petitioner was interrogated. The government argues, and Petitioner agrees, that "the rules of *Miranda* and *Edwards* do not operate differently in the military setting." Gov't Br. at 33. The salient point, however, is that the degree of coercion is radically different because of the training and indoctrination military personnel undergo. Military personnel are conditioned to be different than civilians. Likewise, the military setting differs from the civilian world.

Obedience and submission to authority are ingrained into military personnel from the inception of basic training and are reinforced throughout their careers. Unlike their civilian counterparts, enlisted members of the military are not encouraged to "question authority." Thus, in context, a question directed to a young, low ranking enlisted man has an element of coercion that is simply absent from an identically phrased question asked of a civilian.

There are several reasons why this is so. In the words of one commentator:

> One reason is the apparent power of formal authority. By the time that servicemen reach the combat situation, their experience with formal military discipline should have accustomed them to obedience by demonstrating to them that the [military] does have the power to detect and punish overt resistance or noncompliance by individuals. One of the principal purposes of basic training, for example, is to show the trainees just how easily they can be made to submit to . . . authority. A second reason is that formal authority can be used to define the limits of the

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to incriminate himself any further. Quite simply, the obligation of interrogators to honor a suspect's right to counsel should not depend on the officer's subjective view of whether a statement was sufficiently clear to be an invocation, any more than it should turn on the suspect's strength of will or ability to resist additional questioning from the interrogators.

> serviceman's environment and thus his expectations. A military organization is . . . a "total institution": work, subsistence, and recreation are all under the control of a single authority. Once such an organization has shown its power to completely withhold esteem, comfort, and leisure, it can establish a baseline of expectation from which any increase will appear to be an act of benevolence by the individual responsible.

James H. Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C.L. Rev. 177, 224 (1984).

Compliance with authority, even where it may endanger life and limb, is ingrained and expected behavior in the military. Thus, when the NIS Agents began to question Petitioner, his normal and trained response was to comply with their wishes; to cooperate and to answer their questions in the manner he expected that they wanted the questions answered. While the rules of *Miranda* and *Edwards* do not operate differently in this setting, the application of these rules must take into account the very real, albeit subtle, forms of coercion that were at work undermining Petitioner's ability to articulate his request for counsel any more clearly and unmistakably than "[m]aybe I should talk to a lawyer." Petitioner does not advocate a different standard for the military *per se*, but notes the fundamental difference between military and civilian society only to stress that the focus must be on the state of mind of the suspect.

B. Allowing Clarification Of Ambiguous Requests For Counsel Invites Abuse By Overzealous Interrogators And Is Likely To Be Seen By The Suspect Who Makes An Ambiguous Request As An Attempt To Quell That Request Even Where Interrogators Act In Good Faith.

The government discounts the likelihood that clarifying questions will be perceived by a suspect as badgering. Gov't Br. at 22, 23 n.15. However restricted such clarification might be, however,

the very asking of clarifying questions after an ambiguous request will either have a coercive effect, or be likely to be perceived as such by a suspect. Pet. Br. at 24-29. Indeed, the suspect whose request for counsel is ambiguous is the one most likely to be easily coerced. For example, the government does not explain how a suspect who actually intended to invoke the right to counsel, but who was either intimidated by the setting or unable to speak with the precision and clarity the government would require, could view such questioning in any other way.

A lay person without legal training who states 'maybe I should talk to a lawyer' is likely to believe these words sufficient to invoke the right to counsel, especially where the suspect has not been instructed—as Petitioner was not—that any invocation of the right to counsel must be unmistakably clear. From the suspect's viewpoint, *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980), the additional questioning about the request for counsel, will likely be taken as an indication that the police are disinclined to honor the request.

Although the government argues that any clarification must be narrowly limited, the government does not offer any legitimate explanation for why the Agents said that they were not there to violate Petitioner's rights. This statement can only be interpreted as an effort to convince Petitioner that they were preserving his rights, and therefore looking out for his interests, when their goal was to elicit a confession.

Indeed, *Miranda* recognized that such police questioning may be perceived as coercive. In *Miranda*, the Court observed that:

> [e]ven preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process. Thus the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during *any* questioning if the defendant so desires.

384 U.S. at 470 (emphasis added).[6]

Similarly, *Edwards* acknowledged that questioning would be perceived by suspects as coercive. *See Michigan v. Harvey*, 494 U.S. 344, 350 (1990) (*Edwards* is "designed to prevent police from badgering a defendant from waiving his previously asserted *Miranda* rights."). The Court recently reemphasized this reasoning in *Minnick v. Mississippi*, 498 U.S. 146 (1990). In *Minnick*, the Court held that the police could not reinitiate questioning of a suspect who had invoked the right to counsel even after the suspect had been permitted to consult with counsel. This holding was based, in part, on the Court's recognition that a "single consultation with an attorney does not remove the suspect from *persistent attempts by officials to persuade him to waive his rights, or from the coercive pressures that may accompany custody and that may increase as custody is prolonged.*" *Id.* at 153 (emphasis added).[7]

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[6] The distinction between clarifying an ambiguous statement and advising a suspect about the right to counsel or dissuading a suspect from invoking the right to counsel is, at best, nebulous. In many cases, which side of the line a police officer's conduct falls on is likely to turn on the suspect's resolve and determination rather than any good or bad faith on the part of the interrogating officer. In this regard, the police officer's job requires that he or she come as close to the line as possible without crossing it. *See Fare v. Michael C.*, 442 U.S. 707, 721 (1979) ("probation officer would be bound to advise his charge to cooperate with police"). *See also Oregon v. Elstad*, 470 U.S. 298, 316 (1985).

[7] The reasoning of Justice Scalia's dissent in *Minnick* confirms that police questioning about a suspect's desire to consult with counsel is likely to be seen by a suspect as coercive. Justice Scalia's *Minnick* dissent asserted that the inherently coercive atmosphere of custodial interrogation is dispelled after police honor a suspect's request for counsel, because the suspect then "knows that he has an advocate on his side, and that the police *will permit him to consult that advocate.*" *Id.* at 162 (Scalia J., dissenting) (emphasis added). It follows that, from the suspect's perspective, additional questioning about a suspect's desire to consult with counsel, when counsel has not

In sum, the government's assertion that suspects are likely to understand clarifying questions as evidence "that the police recognize and are prepared to honor [the] right to counsel," Gov't Br. at 23 n.15, is as unsupported by practical expectations as it is by precedent. Quite the contrary, the government's proposed rule has a high cost: the likelihood that suspects who are unable to speak with precision will be questioned about ambiguous requests for counsel and dissuaded, whether deliberately or inadvertently, from insisting on or otherwise pursuing their right to counsel. Ultimately, such a rule would deny equal access to counsel based on a suspect's sophistication or forcefulness in the first instance, and subsequently would deny counsel if such a suspect further lacks sufficient determination and resolve to defend his or her invocation in the face of additional police "clarifying" interrogation.

C. Petitioner's Standard Strikes The Proper Balance Between A Suspect's Absolute Right To Choose Whether To Consult An Attorney And The Government's Desire To Investigate Crimes.

The government suggests that Petitioner's proposed standard will interfere with a suspect's right to choose whether to invoke the right to counsel. Gov't Br. at 25-30.[8] The government's professed concern rings hollow, however, where it proffers as

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been provided, is likely to be seen as evidence that the police will not permit the suspect to consult an attorney.

[8] The government suggests that Petitioner argues for a rule "deeming any reference to a lawyer to be a request for counsel . . . ." Gov't Br. at 27. This is inaccurate. Petitioner has conceded that "not every reference to an attorney by a suspect in custody requires that questioning cease." Pet. Br. at 22. For example, Petitioner agrees with the government that the hypothetical statement "My lawyer told me that they can't convict you of bank robbery if you don't actually go into the bank" does not invoke the right to counsel. Gov't Br. at 30 n.18. A reference to a lawyer that, in context, could not reasonably be understood as a request for counsel does not invoke the right to counsel under *Edwards*.

champion of the suspect's Fifth Amendment rights the same police officer attempting to solicit a confession.

Ultimately, the government's concerns are unfounded. A suspect who does not wish to invoke the right to counsel, but whose interrogation the police halt after an ambiguous statement that could reasonably be considered a request for counsel, is free to refuse any offer of counsel or to reinitiate questioning, thus waiving the right to counsel once invoked.

Whether the Court adopts Petitioner's proposed standard, the government's suggestion or some other standard, there will always be close cases. Petitioner's proposed standard, however, is consistent with *Miranda*, Pet. Br. at 13-15, and is one which the Court had adopted in the context of *Miranda* waivers, Pet. Br. at 19, as well as in the context of the reinitiation of interrogation under *Miranda*, Pet. Br. at 19.

In *North Carolina v. Butler*, 441 U.S. 369 (1979), the Court declined to adopt a *per se* standard prohibiting only explicit waivers of the *Miranda* rights. *Id.* at 375-76. Instead, the Court stressed that a proper evaluation of the issue required examination of the context in which a suspect's statements are made: "the question of waiver must be determined on 'the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.' " *Id.* at 374-75 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). Petitioner's proposed standard likewise looks to the context in which a suspect's statement is made, and would resolve doubts in favor of the protection of the constitutional right, as did *Zerbst*.[9]

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[9] The government's argument that Petitioner urges this Court to adopt a new standard for the application of *Miranda* in the military setting, Gov't Br. at 33, is misplaced. Petitioner's argument is simply that the military setting provides a large part of the context within which Petitioner's statement must be evaluated.

Similarly, in *Oregon v. Bradshaw*, 462 U.S. 1039 (1983) (plurality opinion), the Court was called upon to determine the legal significance of an "ambiguous" statement made by a suspect in custody. 462 U.S. at 1045 (plurality opinion). Concluding that the suspect's statement "could reasonably have been interpreted by the officer" as reinitiating discussion of the subject of the investigation, the plurality held that this was sufficient to permit the police to resume interrogation. *Id.* at 1045-46 (plurality opinion). To adopt the same standard used in *Butler* and *Bradshaw* is appropriate because the questions in those cases and the issue presented here are the same: what legal effect is to be given a statement made by a suspect during custodial interrogation? Indeed, to adopt the government's proposed standard would be grossly unfair, because to do so would make it easier for a suspect to waive the *Miranda* rights than it would be to invoke them.

By contrast, the government relies on cases that do not focus on the legal significance of a defendant's utterances while in custodial interrogation.[10] *See Moran v. Burbine*, 475 U.S. 412 (1986)

[10] As the government has stated, Gov't Br. at 17 n.12, the Court in *Miranda* referred to Federal Bureau of Investigation guidelines that provided that if a suspect "is indecisive in his request for counsel, there may be some question on whether he did or did not waive counsel. Situations of this kind must necessarily be left to the judgment of the interviewing agent." 384 U.S. at 485 (citing *Hiram v. United States*, 354 F.2d 4 (9th Cir. 1965)). *Hiram*, however, did not present a question about the legal effect of an ambiguous request for counsel. This passage merely refers to the practical implications of the rule announced in *Miranda*, and was not intended to displace the standard reiterated throughout the Court's opinion in *Miranda*: that all questioning must cease when a suspect indicates "in any manner at any stage of the process that he wishes to consult with an attorney." 384 U.S. at 444-45. The reference to the Agent's "judgment" was not intended to authorize the Agent to "clarify" a suspect's intent. Rather, although the Agent must exercise judgment as to whether the suspect has invoked the right to counsel, the "ultimate responsibility for resolving the constitutional question lies with the courts." 384 U.S. at 486 n.55.

(finding police officers' failure to disclose that attorney was attempting to consult with defendant was immaterial to defendant's decision whether to waive *Miranda* rights); *Solem v. Stumes*, 465 U.S. 638 (1984) (holding that rule of *Edwards* not retroactive in application); *Wyrick v. Fields*, 459 U.S. 42 (1982) (per curiam) (standard for assessing waiver of right to counsel is totality of circumstances); *Michigan v. Mosley*, 423 U.S. 96 (1975) (addressing Fifth Amendment right to remain silent under *Miranda*).

The government is also mistaken in suggesting that Petitioner's proposed rule does not provide a brighter line than the rule advocated by the government. Gov't Br. at 24 n.16 (arguing that Petitioner's rule merely draws the line in a different place). Taking one sentence from footnote 34 of Petitioner's Brief out of context, the government misconstrues Petitioner's Principal Brief as suggesting that clarification may be appropriate in some circumstances. That language, however, merely sets forth an alternative argument. To the extent that the Court may hold that clarification is appropriate in some circumstances, Petitioner urges this Court to define those circumstances narrowly: situations where it is "possible, but unlikely, that a suspect is requesting counsel." Pet. Br. at 33 n.34.[11] Likewise, if the Court does permit clarification, it should adopt a strictly limited inquiry such as that proposed by Petitioner. *See* Pet. Br. at 33 n.34.

[11] Where it is probable or likely that the suspect is requesting counsel, there should be no need to clarify the suspect's intent, and, under any standard, the statement should be considered sufficient to invoke the right to counsel. The government, however, would require that a suspect do better than show that his or her intent was *probably* to invoke the right to counsel. Put another way, the government would demand more than a suspect's words demonstrate that it was likely that he or she intended to invoke the right to counsel. Rather, the government would require that the suspect make his or her intent *clear*. Such a burden is simply too great to bear for a suspect undergoing the pressures of custodial interrogation.

Another benefit of Petitioner's proposed standard is the ease with which it could be administered. While a rule permitting clarification would foist yet another rule for police to consider and apply during the dynamic question-by-question interrogation process, Petitioner's proposed rule adheres to the bright line adopted in *Edwards* and reinforced in *Smith v. Illinois*, 469 U.S. 91 (1984) (per curiam) and avoids promulgation of yet another rule—and a nebulous one at that. Moreover, Petitioner's proposed rule would promote equality in the administration of constitutional rights.

In short, Petitioner's proposed standard flows from the Court's prior decisions concerning the legal consequences of a suspect's statements during custodial interrogation. Such a standard further recognizes that ordinary people do not speak with the clarity and precision that the government would have this Court require lay persons to use in order to invoke the fundamental right to counsel. In this regard, the government's professed desire to avoid foisting a lawyer on a suspect who has not expressed a desire to consult with one, Gov't Br. at 20, is disingenuous. On the one hand, a suspect is not harmed if provided with a lawyer for he is free to dismiss counsel. On the other hand, the government would force suspects who do wish to consult with an attorney but who express that desire in less than emphatic terms to undergo a collateral interrogation concerning that desire before it is honored. The bright line rule of *Edwards* was intended precisely to prevent such badgering. *See Smith*, 469 U.S. 98-99 (1984) (per curiam) ("[u]sing an accused's subsequent responses to cast doubt on the adequacy of the initial request *itself* is even more intolerable").

In sum, it is easy for a suspect who does not desire counsel to dismiss such counsel if provided, and no harm is done. On the other hand, requiring a timid suspect to undergo a collateral interrogation on his or her request for counsel may well cause retraction of that request. Petitioner submits that a rule which errs on the side of caution is a rule which evinces proper

regard for so fundamental a Constitutional guarantee as the right to counsel.[12]

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court reverse the judgment of the Court of Military Appeals and remand for appropriate proceedings.

Respectfully submitted,

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[12] Petitioner agrees with the government that 18 U.S.C. § 3501 does not apply to this case.

** The valuable assistance of Diane E. Brehm, University of Pennsylvania Law School class of 1994, is gratefully acknowledged.

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No. 93-1949

In The

Supreme Court of the United States

October Term, 1993

ROBERT L. DAVIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The
Court Of Military Appeals

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

When a suspect makes an ambiguous request for counsel during a custodial interrogation, must the interrogator cease questioning until the suspect is provided with counsel?

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INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia nonprofit corporation whose membership of more than 7,000 regular members and 25,000 affiliate members includes lawyers from every state. The NACDL is the only national bar organization working exclusively on behalf of public and private criminal defense lawyers and their clients. The American Bar Association recognizes the NACDL as an affiliated organization and awards it full representation in the ABA House of Delegates.

NACDL members are in daily contact with the criminal justice system, representing individuals in both the state and federal courts. In providing legal representation for those accused of crimes, NACDL seeks to secure the constitutional rights of all citizens and to preserve and

improve the American system of criminal justice. The *Amicus Curiae* Committee of the NACDL has discussed this case and decided that the issue presented is of such importance to citizens throughout the nation who will in the future be confronted with police interrogation that the NACDL should offer its assistance to the Court.

NACDL members represent both male and female clients of every race, ethnic group, and social class. Many of our clients belong to groups whose members ordinarily express themselves using speech patterns that vary from those of "standard" English usage. These clients are less likely to use direct, assertive language in their interactions with the police, so that their attempts to invoke their constitutional rights could appear to be ambiguous or equivocal. Because the Court's decision in this case will determine the degree of constitutional protection to be accorded to these clients' attempts to invoke their constitutional rights during interrogation, we seek to be heard on their behalf. Consent has been given by both parties to the filing of this *amicus curiae* brief, and letters confirming this consent have been lodged with the Clerk of this Court.

SUMMARY OF ARGUMENT

This Court has long held that individuals in police custody undergoing interrogation have the right under the Fifth Amendment to consult with legal counsel. To effectuate this right, *Edwards v. Arizona* holds that police interrogation must cease once a suspect has invoked his right to counsel. When, however, the individual's invocation of that right is in some way ambiguous or equivocal, the question becomes whether such an invocation triggers the *Edwards* bar on further police interrogation. *Amicus* urges this Court to hold that all cognizable requests for counsel satisfy the *Edwards* rule because alternates to such a rule provide lesser constitutional protection to those who happen to frame their requests

for counsel in indirect and hedged ways, while providing enhanced constitutional protection to those who fortuitously express their wishes using direct and assertive language. The arbitrary unfairness of this result is compounded by the fact that certain discrete groups within the population – particularly women and members of certain ethnic groups – disproportionately adopt speech patterns that include indirect and hedged linguistic characteristics. Adopting a per se rule that all cognizable requests for counsel are given full legal effect, on the other hand, would provide equivalent constitutional protection to all citizens, regardless of the speech patterns they happen to use in invoking their constitutional rights.

ARGUMENT

I. *Miranda v. Arizona* and *Edwards v. Arizona* Establish the Constitutional Framework for the Exercise by Suspects of their Fifth Amendment Rights during Police Interrogation.

The right of an individual to be free from compelled self-incrimination is a fundamental attribute of our adversarial criminal justice system. This right, enshrined in the Fifth Amendment to the United States Constitution, operates to protect the individual from certain police tactics during custodial interrogation. For the past quarter century, *Miranda v. Arizona*, 384 U.S. 436 (1966), has provided the doctrinal framework for the effectuation of the Fifth Amendment right against compulsory self-incrimination in the context of custodial police interrogation, requiring prescribed warnings informing suspects of their rights. *Id.* at 444-45. In an attempt to "dispel the compulsion inherent in custodial surroundings," the *Miranda* court held that the Fifth Amendment required the police to specifically inform suspects in custody of their constitutional rights and obtain waivers of those rights before any police interrogation could take place. *Id.* at 458, 444-45. Suspects must be informed both of their right

to remain silent in the face of police questioning and also of their right to consult legal counsel, retained or appointed, during interrogation. *Id.* at 444-45, 468, 471, 478-79.

The ability of persons undergoing police interrogation to interpose the presence of legal counsel was intended by the *Miranda* Court to reduce the psychological pressure on them created by common interrogation practices.[1] Therefore, the Court held that the Fifth Amendment guarantees individuals the right to have the assistance of counsel while being questioned in police custody. *Id.* at 470-73.

Once an interrogated suspect has affirmatively invoked the right against self-incrimination under the Fifth Amendment, *Miranda* holds that further police questioning is severely constrained. 384 U.S. at 444-45. Fifteen years after *Miranda*, this Court, in *Edwards v. Arizona*, 451 U.S. 477 (1981), re-affirmed *Miranda* and explicitly announced a bright-line rule cutting off further police questioning upon assertion of the right to counsel. In *Edwards*, this Court made it clear that, once the Fifth Amendment right to counsel during interrogation is invoked, questioning must cease unless counsel has been provided or the suspect himself initiates the resumption of the exchange. *Id.* at 484-85. Post-*Edwards* cases decided by this Court have continued to enforce this bright-line rule prohibiting police-initiated interrogation following invocation of the right to counsel. *See, e.g., Arizona v.*

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[1] *Miranda*, 384 U.S. at 449, 470. The *Miranda* opinion describes in considerable detail methods of police interrogation recommended in police procedural manuals. Recent editions of such manuals show that police tactics and techniques in interrogation have changed little in the past twenty five years. *See, e.g.*, John M. Macdonald & David L. Michaud, *Interrogation and Criminal Profiles for Police Officers* (1987); Fred E. Inbau, John E. Reid & Joseph P. Buckley, *Criminal Interrogation and Confessions* (3rd. ed. 1986).

Roberson, 486 U.S. 675, 682-88 (1988) (questioning by officer unaware of earlier invocation of the right to counsel in interrogation about an unrelated crime barred by *Edwards*); *Minnick v. Mississippi*, 494 U.S. 146 (1990) (*Edwards* violated by questioning a suspect, who had earlier invoked his right to counsel, outside the presence of counsel even though the suspect had had the opportunity to consult counsel since the time of his earlier invocation).

II. Lower Federal and State Courts Have Applied Three Differing Standards in Assessing Whether a Suspect's Attempt to Invoke the Right to Counsel will Trigger the *Edwards* Rule.

Before the *Edwards* rule can operate to bar subsequent police interrogation, the suspect must say or do something to invoke the Fifth Amendment right to counsel. If an individual invokes this right using direct, clear and emphatic language, this Court's opinions unmistakably mandate that further interrogation must cease. If, however, the suspect's request for counsel is not framed in direct, clear, and emphatic language, there is currently no Supreme Court precedent requiring such invocations to be given legal effect. In the absence of Supreme Court caselaw directly on point, some state and lower federal courts have evaded the *Edwards* rule by holding that indirect or ambiguous invocations of the right to counsel do not serve to bar subsequent police questioning.

The question before this Court is, what standard should courts apply in determining whether a suspect has invoked the right to counsel? Should a suspect's words requesting counsel be liberally construed as an assertion of the right to counsel? Or should a reviewing court require unambiguous clarity and directness in the language used by a suspect in police custody before a request for legal assistance will be considered an effective invocation of the right to counsel?

State and lower federal courts have taken three different approaches to the question of the legal consequences of an apparently ambiguous or equivocal invocation of the right to counsel by a suspect. Under the so-called "threshold-of-clarity" standard, an attempted invocation of the right to counsel must be direct and unambiguous before it will be considered effective. Under the "clarification" standard, an ambiguous or equivocal invocation of the right to counsel permits the police to continue the exchange in order to clarify the suspect's intent before proceeding with further general questioning. The third approach, the "per se" standard, treats any post-warning reference by a suspect to his or her desire for counsel as an effective invocation of the right to counsel, barring further police-initiated questioning.

III. This Court Should Hold that Any Attempted Invocation of the Right to Counsel by an Arrestee is Sufficient to Bar Subsequent Police Interrogation, Because Only this Rule will Ensure that Constitutional Guarantees are Equally Available to All Citizens.

A. People who express themselves using indirect and non-assertive speech patterns should not thereby be penalized when they attempt to invoke their right to counsel.

If this Court were to adopt a rule that requires unambiguous clarity in invocations of counsel, then only those who frame their requests for counsel in direct and unqualified language would receive the assistance of the *Edwards* rule in exercising their constitutional rights. Not all people do express themselves using direct and unqualified language, however; yet under the threshold of clarity and clarification standards, such individuals receive lesser constitutional protection than those who fortuitously use unambiguous assertive language in invoking their rights.

The degree of constitutional protection accorded to suspects should not differ based upon the way in which they happen to express their requests for counsel. But the vice of such a doctrine goes beyond its arbitrary refusal to give constitutional protection to some individuals while giving other similarly situated persons the full benefit of the *Edwards* rule, because the burdens of a rule favoring direct and assertive language tend to fall disproportionately on certain identifiable groups within our population. Sociolinguistic research demonstrates that certain discrete segments of the population – women and many minority ethnic groups – are far more likely than other groups to adopt indirect and hedged speech patterns. This Court should not adopt a rule that penalizes individuals who tend to use an indirect mode of expression, particularly when indirect speech patterns are characteristic of members of certain groups that have historically been disadvantaged.

B. Women and members of certain ethnic groups frequently use indirect or hedged speech patterns that will make their attempts to invoke their constitutional rights appear to be equivocal.

Linguistics researchers have found that some people habitually speak in a distinctive register of English characterized by frequent use of vocabulary and grammatical features that makes these speakers appear to be hesitant or equivocal about what they are saying. Speakers who adopt this register often use hedges in their speech, such as beginning a statement with qualifying language such as "I think," or "maybe," or "I suppose".[2] Such speakers might invoke the right to counsel by saying "I think I'd better talk to a lawyer," or "Maybe I should see a lawyer,"

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[2] *See* Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 Yale L.J. 259, 276-77 (1993).

or "I guess I should speak with a lawyer." They likewise tend to avoid using imperatives, and in place instead substitute indirect questions. For example, rather than invoking the right to counsel by using the direct imperative, "Call me a lawyer," a person using this register might ask the question, "Would you mind calling me a lawyer?"[3] Other characteristics of this register include the use of tag questions, where direct statements are turned into questions posed to the other party to the speech,[4] and the use of rising intonation – ordinarily used to signal that a question is being asked – in making declarative statements.[5] Collectively, the grammatical features of this speech register create in the listener an impression of uncertainty or equivocality on the part of the speaker because the speaker eschews strong, assertive modes of expression in favor of softer, more indirect, and tentative-sounding turns of phrase.

This register, first observed by researchers studying the contrasting patterns of language use by men and women, is sometimes called "women's language" or the "female register" in recognition of the fact that it is a mode of expression that women disproportionately adopt as compared to men.[6] Further, subsequent research has

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[3] *See* Ainsworth, *supra* note 2, at 281.

[4] An example of a tag question is, "I should get a lawyer, shouldn't I?" For further discussion of the syntax and meaning of tag questions, see Ainsworth, *supra* note 2, at 277-79.

[5] Ainsworth, *supra* note 2, at 282; *see also* Sally McConnell-Ginet, *Intonation in a Man's World*, 3 Signs 541-59 (1978). This tendency to use a rising intonation at the end of declarative statements is particularly noticeable among younger women.

[6] Robin Lakoff conducted the pioneering research in this field, with extensive follow-up work carried out by many other sociolinguists. *See, e.g.*, Robin T. Lakoff, *Language and Women's Place* (1975). For a discussion of the body of sociolinguistic research demonstrating that this hedging register is used more frequently by women than by men, see Ainsworth, *supra* note 2, at 271-75.

determined that, although the use of this register is gender-linked, gender differences in language use are magnified in certain contexts. This register is especially likely to be adopted by women in contexts where there is a power disparity between the speaker and the person to whom the speech is addressed.[7]

In fact, the correlation between powerlessness and the use of this "female register" has proven to be even more pronounced than is the correlation between gender and the use of this register.[8] For example, one study examined many hours of courtroom transcripts to see whether witnesses used this "female register," and if so, under what circumstances they tended to adopt it. Female witnesses used this mode of expression more often than did male witnesses; however, the social status of the witness turned out to be a better predictor of the use of this "female register" than was gender alone.[9] Males who held low-status jobs or who were unemployed used more of the characteristic hedging features of the "female register" than did males or females of higher social status.[10] The researchers conducting this study concluded that it is more appropriate to call this linguistic register, distinguished by the predominance of hedged and indirect speech forms, "powerless language" rather

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[7] See Ainsworth, *supra* note 2, at 283-86.

[8] William O'Barr, *Linguistic Evidence: Language, Power, and Strategy in the Courtroom* (1982); Bonnie Erickson, E. Allan Lind, Bruce C. Johnson & William O'Barr, *Speech Style and Impression Formation in a Court Setting*, 14 J. of Experimental Soc. Psych. 266-79 (1978); E. Allan Lind & William O'Barr, *The Social Significance of Speech in the Courtroom*, in *Language and Social Psychology* 145-57 (Howard Giles & Robert N. St Clair eds., 1979); Bowman K. Atkins & William M. O'Barr, *"Women's Language" or "Powerless Language"?* in *Women and Language in Literature and Society*, 93-110 (Sally McConnell-Ginet, Ruth Borker & Nelly Furman eds. 1980).

[9] O'Barr, *supra* note 8, at 61-65.

[10] *Id.* at 69.

than "women's language."[11] Those who are, or perceive themselves to be, relatively powerless in a particular situation will be more likely to use this hedging mode of expression because they will be uncomfortable about imposing demands directly upon the persons with whom they are speaking. Those in a subordinate position – for example, low ranking military personnel – would therefore be likely to use this speech register to avoid the presumptuousness of making a direct demand upon higher ranking officers or other authority figures.

Once researchers had identified this "female register," they found many other social groups that disproportionately used a similar indirect and hedged speech register. Many ethnic speech communities within the United States were found whose members, like women using the "female register", avoided the direct, assertive, unqualified speaking style of so-called "standard" English. For example, linguistic researchers observed that indirect speech patterns are common within African-American spoken language.[12] In addition, members of many other ethnic groups, whose native tongues include languages such as Arabic, Farsi, Yiddish, Japanese, Indonesian, and Greek, use indirect and hedged speech patterns far more frequently than do speakers of standard English.[13] Moreover, speakers of these languages tend to incorporate these indirect speech patterns into their

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[11] *Id.* at 65-71.

[12] Thurmon Garner, *Cooperative Communication Strategies: Observations in a Black Community*, 14 J. Black Stud. 233, 234-48 (1983). *See also*, Geneva Smitherman, *Talkin' and Testifyin': The Language of Black America* 97-100 (1977) (discussing the use of indirect language in vernacular Black English).

[13] A preference for indirect speech patterns occurs among a wide variety of unrelated languages. Muriel Saville-Troike, *The Ethnography of Communication* 14, 35 (2d ed. 1989); Deborah Tannen, *Ethnic Style in Male-Female Conversation*, in *Language and Social Identity* 223-30 (John J. Gumperz ed. 1982).

English usage, retaining the preferred modes of expression from their native languages even when they switch into English.[14] In fact, there is evidence that ethnic communities may perpetuate their indirect speech conventions over generations, and that even third and fourth generation members who speak only English may continue to use these typically ethnic speech patterns in their native English.[15] If this Court adopted a rule that required clear and unambiguous invocation of the right to counsel, however, speakers from such an ethnic group whose speech conventions militate against making direct assertions would find that their invocations of the constitutionally-guaranteed right to counsel were given no legal effect.

C. The police interrogation context is likely to accentuate the tendency that an individual will use indirect or hedged language in responding to police questioning.

Gender, ethnicity, and socioeconomic class are not the only factors affecting the likelihood that a speaker will use an indirect and hedging speech register. Even within speech communities whose members do not ordinarily use indirect modes of expression, individual speakers who are situationally powerless tend to adopt a hedging speech register. Research indicates that, in circumstances in which people are comparatively powerless, the prevalence of "female register" features in their speech is

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[14] John J. Gumperz & Jenny Cook-Gumperz, *Introduction: Language and the Communication of Social Identity*, in *Language and Social Identity* 1, 6 (John J. Gumperz ed. 1982); Saville-Troike, *supra* note 13, at 35.

[15] In a study of speech patterns across three generations of Greek-Americans, Deborah Tannen concluded that Greek Americans, even those who spoke no Greek, persistently used more indirect speech patterns than those found in standard English. Deborah Tannen, *supra* note 13, at 223-30.

higher than it would normally be.[16] The police interrogation setting by its very nature involves an imbalance of power between the suspect and the interrogator, thus increasing the likelihood that a particular suspect will adopt an indirect, and thus equivocal sounding, mode of expression.

The typical police interrogation of an arrested suspect has a number of characteristics that mutually act to reinforce the questioned suspect's perception of powerlessness.[17] First, the interrogation is conducted as a one-sided exchange in which the interrogating officer asks the questions and the suspect is expected to provide the answers. The interrogating officer controls the subject matter, tempo, and progress of the questioning, reserving the right to interrupt responses to questions and to judge whether the responses are satisfactory. The person questioned, on the other hand, cannot question the interrogator, or even question the propriety of the questions put to him by the interrogator. Police procedural manuals recommend that the interrogating officer consciously manipulate every aspect of the interaction in order to enhance the perceived power of the interrogator and minimize the sense of power and independence of the suspect.[18] The

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[16] Empirical research on the "female register" suggests that the higher the imbalance of power in the communicative relationship, the higher the incidence of indirect language by the less powerful speaker. Janet Holmes, *'Women's Language': A Functional Approach*, 24 General Linguistics 149, 157 (1984) (summarizing the research on the correlation of powerlessness and the use of female register).

[17] *See* D. R. Watson, *Some Features of the Elicitation of Confessions in Murder Interrogations*, in *Interaction Competence* 263, 272-79 (George Psatha ed., 1990); Norman Fairclough, *Language and Power* 18 (1989) (discussing police interrogation as exemplification of a context involving one-sided control of the communicative exchange).

[18] *See, e.g.*, John M. Macdonald & David L. Michaud, *Interrogation and Criminal Profiles for Police Officers* 33-35 (1987); Fred

explicit aim of the interrogator is to conduct the questioning in such a way as to increase the anxiety felt by the suspect, who will then be more vulnerable to police interrogation tactics.[19] For example, the interrogating officer ideally maintains complete control over the physical environment in which the questioning takes place, making sure that the suspect remains isolated in unfamiliar surroundings designed to keep him psychologically off balance.[20] It is the interrogator who decides how long the interrogation session will last, with prolongation of the session intentionally exploited as a tactic with which to achieve an advantage over the suspect.[21] Similarly, the interrogator unilaterally determines the subject matter of the interrogation and the manner in which the questions are asked, taking full advantage of a wide variety of tactics designed to control the interrogation and overcome the suspect's resistance,[22] including accusatory confrontation of the suspect,[23] trickery and deception,[24] baiting questions designed to insult or humiliate,[25] and appeals to the suspect's religious values.[26] Even the suspect's ability to answer questions is constrained by the interrogator, who is advised to repeatedly interrupt denials and attempts to explain by the suspect in order to condition the suspect to accept complete domination by

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E. Inbau, John E. Reid & Joseph P. Buckley, *Criminal Interrogation and Confessions* 24-42 (3rd. ed. 1986).

[19] Inbau, Reid, & Buckley, *supra* note 18, at 342-45.

[20] *Id.* at 24-28.

[21] *Id.* at 310 (suggesting sessions of up to four hours in length to break a suspect's will to resist confessing).

[22] *See generally*, Macdonald & Michaud, *supra* note 18, at 26-47 (1987); Inbau, Reid & Buckley, *supra* note 18, at 77-208.

[23] Inbau, Reid & Buckley, *supra* note 18, at 84-93.

[24] *Id.* at 216-19, 319-23.

[25] *Id.* at 68-72.

[26] *Id.* at 164.

the interrogating officer.[27] In short, the interrogating officer aims to exercise total control over every aspect of the interrogation session.[28]

When these routine police practices are combined with the actual physical power that the police have over the arrested individual in custody, that person's perception of powerlessness is dramatically greater than that felt in daily life. This sense of powerlessness created in the specific context of the police interrogation increases the likelihood that hedged "female register" modes of expression will be used by the suspect during custodial interrogation.[29]

Given these factors that determine whether a particular individual will express himself using direct and assertive language or indirect and ambiguous language, it misses the point to ask whether a particular utterance is "really" equivocal or only just "apparently" equivocal, since the adoption of an indirect register, whether consciously or unconsciously, is a response to the contextual powerlessness of the utterer. In a recent study of equivocal language use, several researchers concluded that it is misleading to assume that individuals freely choose to express themselves in an equivocal manner. Rather, equivocation should be seen as the product of the social context in which speakers find themselves, in which direct and assertive statements are perceived as leading to negative consequences for the speakers.[30] This analysis

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[27] *Id.* at 141-53.

[28] Macdonald & Michaud, *supra* note 18, at 33.

[29] *Cf.* O'Barr, *supra* note 8, at 64-71 (noting that powerlessness correlated with the extent to which witnesses in court displayed "female register" characteristics in their speech).

[30] Janet Beavin Bavelas, Alex Black, Nicole Chovil & Jennifer Mullett, *Equivocal Communication* 54 (1990):

> [A]lthough an individual equivocates, he or she is not the cause of equivocation. Rather, equivocation is the result of the individual's communicative situation. Equivocation is avoidance; it is the response chosen when all other communicative choices in the situation would lead to negative consequences.

Id. at 54.

suggests that powerless people, who most often perceive themselves to be in such "no-win" situations, would tend to adopt more equivocal speech patterns. Therefore, the use by an individual of an indirect mode of expression in invoking the right to counsel is not a dependable indication that the individual is truly ambivalent about the right, but is likely to be a product of a context in which a bald demand for counsel is seen as an inappropriate response given the power disparity between the interrogator and the suspect.

IV. A Bright Line Rule Requiring the Police to Respect All Apparent Invocations of the Right to Counsel is Superior to the Other Two Standards in Guaranteeing Equivalent Legal Protection to All Individuals in Exercising Their Constitutional Right to Counsel.

This Court should adopt the per se standard that triggers the *Edwards* rule whenever a suspect apparently requests counsel because such a rule gives the same degree of constitutional protection to all suspects regardless of the modes of expressions that they may employ in invoking their right to counsel. The experience of lower federal and state courts in applying the other two standards, the threshold-of-clarity and the clarification standards, demonstrates the inadequacy of those standards to assure that all individuals receive equality of treatment under the law for the protection of their fundamental constitutional rights.

A. The threshold-of-clarity standard fails to protect the constitutional rights of the many individuals using indirect speech patterns, since under that standard, only direct and assertive invocations receive any constitutional protection.

Courts adopting the threshold-of-clarity standard, while paying lip service to the language of *Miranda* that the right to counsel can be invoked by a suspect "in any manner",[31] have in practice required that an assertion of the right to counsel be direct and absolutely unambiguous before according it any legal effect.[32] A frequently-cited Illinois case demonstrates the inadequacy of the threshold-of-clarity standard. In *People v. Krueger*, 412 N.E.2d 537 (Ill. 1980), police were questioning a suspect in custody about several burglaries. In the course of the interrogation, the interrogating officers began to ask the suspect about a stabbing death. At that point, the suspect said, "Wait a minute. Maybe I ought to have an attorney. You guys are trying to pin a murder rap on me, give me 20 to 40 years." *Id.* at 538. The officers did not provide a lawyer to the suspect, and continued their interrogation of him. *Id.* at 538-39. The Illinois Supreme Court held that the use by the defendant of the hedge "maybe", even in the context of his exclamation that the

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[31] "If . . . [the suspect] indicates *in any manner* and at any stage of the process that he wishes to consult with an attorney before speaking, there can be no questioning." *Miranda*, 384 U.S. at 444-45 (emphasis added).

[32] Courts adhering to the threshold-of-clarity rule have required that a suspect's words be "unequivocal", *People v. Lattanzio*, 549 N.Y.S.2d 179, 181 (1989); "clear and unambiguous", *People v. Bestelmeyer*, 212 Cal. Rptr. 605, 607, 609 (Ct. App. 1985); "clear and unequivocal", *Bane v. State*, 587 N.E.2d 97, 103 (Ind. 1992); "unambiguous and unequivocal", *Bunch v. Commonwealth*, 304 S.E.2d 271, 276, *cert. denied*, 464 U.S. 977 (1983); and "without qualification", *Daniel v. State*, 644 P.2d 172, 178 (Wyo. 1982).

police were trying to pin a murder rap on him, deprived him of the constitutional protection of the *Edwards* rule which otherwise would have prevented the police from continuing to question him without a lawyer. In jurisdictions that adhere to the threshold-of-clarity rule, there are many similar cases in which suspects who used hedging language such as "maybe,"[33] "I think",[34] "I feel like,"[35] "I'd like to,"[36] or "I wonder"[37] in their invocations were

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[33] *State v. Campbell*, 367 N.W.2d 454, 458 (Minn. 1985) (suspect's statement "If I'm going to be charged with murder, maybe I should talk to an attorney" not a valid invocation of her right to counsel); *State v. Moore*, 744 S.W.2d 479, 480 (Mo. App. 1988) (suspect's statement that "maybe he needed counsel" did not adequately invoke right to counsel).

[34] *People v. Lattanzio*, 549 N.Y.S.2d 179, 181 (1989) (suspect who said "that he thought, he believed that he wanted a lawyer, that he needed time to think about it" had not invoked his right to counsel); *People v. Kendricks*, 459 N.E.2d 1137, 1140-41 (Ill. 1984) (suspect who said to police, "You know, I kind of think I know [sic] a lawyer, don't I?" or "I think I might need a lawyer," had not effectively invoked the right to counsel); *People v. Bestelmeyer*, 212 Cal. Rptr. 605, 607, 609 (Ct. App. 1985) (suspect who said, "I just thinkin', maybe I shouldn't say anything without a lawyer and then I thinkin' ahh," did not validly invoke right to counsel).

[35] *Bunch v. Commonwealth*, 304 S.E.2d 271, 275-6 (Va.), *cert. denied*, 464 U.S. 977 (1983) (suspect who said he "felt like he might want to talk to a lawyer" did not invoke his right to counsel).

[36] *Bane v. State*, 587 N.E.2d 97, 103-04 (Ind. 1992) (Off: "[I]t's my understanding you don't want to sign the rights form now is that right?" Defendant: "Not 'til you know?" Off: "O.K." D: "When I talk to my lawyer I'll . . . " Off: "O.K. But you don't want a lawyer at this time, is that correct?" D: "I will get a lawyer." Off: "O.K. But you don't want one now is what I'm saying. O.K.?" D: "*I'd like to have one* but you know I it would be hard to get ahold of one right now." Off: "Well what I am asking you Clayton is do you wish to give me a statement at this time without having a lawyer present?" D: "Well I can I can tell you

held to have failed to assert their right to counsel adequately.

The threshold-of-clarity standard also ignores the significance of normal inferences that speakers expect listeners to make in interpreting their words. For instance, in *People v. Harper*, 418 N.E.2d 894 (Ill. 1981), after receiving *Miranda* warnings, the suspect told police that he had a lawyer, and asked the interrogating officer to get the wallet containing his lawyer's business card from his car. The officer responded that this wouldn't be necessary, and continued the interrogation. *Id.* at 896. Applying the threshold-of-clarity standard, the New York appellate court found that the words of the suspect were only an "equivocal", and hence ineffective, assertion of the right to counsel, since the suspect never clearly said that the reason he wanted the officer to retrieve the business card was that he desired to seek the assistance of counsel during the interrogation.[38] In the context of a suspect having just been read his *Miranda* rights, however, it is obvious that the suspect intended to assert his right to counsel by asking the officer to give him the card printed with his lawyer's phone number. His request for the lawyer's card can have no other relevance under the circumstances. Similarly, the words of a suspect who asks the interrogating officer to recommend a good lawyer,[39]

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what I did." Off: "O.K. that's what, that's what I'm asking." Held, too equivocal to be a valid invocation); *Daniel v. State*, 644 P.2d 172, 177 (Wyo. 1982) (suspect's statement that he would "probably like to have an attorney present" was not a valid invocation of the right to counsel).

[37] *State v. Moorman*, 744 P.2d 679, 685-86 (Ariz. 1987) ("I wonder if I need an attorney," did not invoke right to counsel).

[38] *Id.*

[39] *State v. Linden*, 664 P.2d 673, 678 (Ariz. App. 1983) (asking the police "who a good lawyer would be" held not an unequivocal invocation).

or who says that he cannot afford a lawyer,[40] or who says that she is sick of being hassled and wants to call a lawyer,[41] all should be naturally interpreted as implicit statements that the suspect is requesting a lawyer. In each of these cases, however, courts using the threshold-of-clarity standard have found these statements inadequate assertions of the right to counsel. This Court should reject this narrow "threshold of clarity" standard which arbitrarily denies constitutional protection to those who fail to use the right "magic words" in invoking their right to counsel.

B. Under the clarification standard, the police may still continue their questioning of the suspect in order to clarify the suspect's intent. In practice, however, the clarification standard has been interpreted to permit police comments and questions that actively dissuade suspects from invoking their constitutional rights.

The clarification standard appears to chart a middle course between the other two standards for judging ambiguous or hedged assertions of the right to counsel, instructing police to respond to less-than-crystal clear assertions of the right to counsel by asking questions designed to clarify the suspect's request. In contrast to the threshold-of-clarity standard, this approach does give some legal effect to ambiguous or equivocal assertions of the right to counsel. Specifically, under this standard,

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[40] *People v. Mandrachio*, 433 N.E.2d 1272 (N.Y. Ct. of App. 1981) (suspect's statement to the police that he could not afford a lawyer held not a valid invocation of his right to counsel).

[41] *People v. Johnson*, 436 N.Y.S.2d 486, 488 (N.Y. App. Div. 1981); *aff'd*, 434 N.E.2d 261 (N.Y. Ct. App. 1982), on remand on other issue, 453 N.Y.S.2d 537, later opinion 468 N.Y.S.2d 1017 (1982) (defendant who responded to police questioning by saying that "she was tired of being hassled by us, . . . that she was sick and tired of us bothering her and that she wanted to call a lawyer" had not adequately invoked her right to counsel).

hedged assertions of the right to counsel that would be accorded no significance under the threshold-of-clarity standard may be given legally operative effect under the clarification standard, limiting further police interrogation. Unlike the per se invocation rule which absolutely bars further police interrogation upon any assertion of the right to counsel, however, the clarification approach permits the police to continue the interrogative exchange with the suspect after a less-than-clear invocation of the right to counsel. The ensuing police questioning is, at least in theory, limited solely to questions designed to clarify the intent of the suspect as to whether he is asserting his Fifth Amendment right to the assistance of counsel in the interrogation setting.

On its face, the clarification standard appears to strike a balance between the desire of law enforcement to have a free hand in conducting interrogations and the need to guarantee that individuals in custody can meaningfully exercise their constitutional right to counsel. Unfortunately, however, the clarification standard is fraught with possibilities for misapplication, and for that reason should be rejected in favor of the bright-line per se standard.

In all too many cases, the police response to an ambiguous invocation by a suspect is to try to dissuade the suspect from exercising the right to counsel. Tactics used by the police to undermine assertions of the right to counsel range from suggesting that a lawyer is unnecessary at this time,[42] advising suspects that having counsel

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[42] *See, e.g., People v. Russo*, 196 Cal. Rptr. 466, 468 (1983) (police responded to equivocal invocation with, "If you didn't do this, you don't need a lawyer, you know."); *State v. Torres*, 412 S.E.2d 20, 23 (N.C. 1992) (suspect asked the interrogating sheriff whether she needed a lawyer, and was told "no, it [is] best right now to cooperate and tell the truth and that they had been friends for a long time").

would not be in their best interests,[43] telling them that the process of getting counsel is slow and cumbersome,[44] confronting them with the evidence against them in hopes that they would feel the need to respond,[45] or simply asking pointblank for their side of the story.[46]

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[43] *See, e.g., State v. Lampe*, 349 N.W.2d 677, 679-80 (Wisc. 1984) (prosecutor responded to suspect's equivocal invocation with, "Carol, an attorney will tell you at this point that you shouldn't say anything, and I can tell you that if you don't say anything, I am going to ask the next person to see if they will cooperate with us or not and they will get the benefit of the cooperation, so it's your choice."); *Thompson v. Wainwright*, 601 F.2d 768, 769-72 (5th Cir. 1979) (police responded to suspect's statement that he wanted to tell his story to a lawyer before talking to them by emphasizing that counsel would advise him not to talk to the police, which would not be in his best interests).

[44] *See, e.g., Hampel v. State*, 706 P.2d 1173, 1181-82 (Alas. Ct. App. 1985) (suspect who asked about getting a lawyer told by the police how complicated and inconvenient it would be to have counsel appointed).

[45] *See, e.g., Towne v. Dugger*, 899 F.2d 1104, 1107, *cert. denied*, 111 S.Ct. 536 (1990) (police responded to equivocal assertion of the right to counsel by accusing suspect of the crime and confronting him with damaging evidence against him); *State v. Moulds*, 673 P.2d 1074, 1081-83 (Id. App. 1983) (suspect who had just equivocally asserted his right to counsel confronted by the police with apparently incriminating evidence); *Smith v. Endell*, 860 F.2d 1528, 1529 (9th Cir. 1988) (suspect accused of a shooting asked, "Can I talk to a lawyer? At this point, I think maybe you're looking at me as a suspect, and I should talk to a lawyer. . . ." to which interrogating officer responded by discussing the suspect's motive to kill the victim).

[46] *See, e.g., State v. Doughty*, 472 N.W.2d 299, 301-033 (Minn. 1991) (police responded to an equivocal assertion of the right to counsel by saying, "I'm very interested in hearing your side of the story."); *People v. Alexander*, 261 N.W.2d 63, 64 (Minn.), *cert. denied*, 436 U.S. 958 (1977) (police responded to suspect's equivocal invocation with, "I told her I thought she should tell me

None of these responses are genuine attempts to clarify the suspects' intentions with respect to the exercise of the right to counsel. But such responses are inevitable given the inherent conflict of interest felt by the interrogating officer, who will want the interrogation to proceed to a productive discussion of the crime if at all possible, and who at the same time has the obligation under this standard to ascertain whether an ambiguous request for counsel is indeed intended to be an assertion of the right to counsel that will cut off further interrogation. The desire by the police to continue an interrogation is so powerful that it has sometimes resulted in denial of counsel even to those who clearly and unambiguously ask for it. As a federal Narcotics Task Force officer testified concerning his refusal to allow an interrogated suspect to contact counsel, "There's a lot of things in the past that have happened that are not in law enforcement's favor when we let defendants contact lawyers. It has compromised investigations severely." *United States v. Nordling*, 804 F.2d 1466, 1471 n.4. (9th Cir. 1986). Even when the law makes it absolutely clear that counsel must be provided, officers like the agent in *Nordling* are reluctant to do so. Giving police the green light to continue questioning the suspect as long as the questioning is "clarification" questioning and expecting the police questions to be a truly disinterested attempt to ascertain whether the suspect wants counsel flies in the face of experience and human nature. It is simply asking too much of police officers to expect them to confine their follow-up questions to clarification when it is abundantly

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what happened"). For a case using all of the tactics outlined here, see *Hampel v. State*, 706 P.2d 1173, 1181-82 (Alas. Ct. App. 1985) (suspect's inquiry about getting a lawyer answered by the police explaining how complicated and inconvenient the process would be, detailing all of the evidence against the suspect and touting the advantages of telling his side of the story to the police before they spoke to possible co-defendants).

clear that their professional interests will be thwarted if the suspect does in fact invoke the right to counsel.

Further, reviewing courts in jurisdictions adopting the clarification approach have exacerbated the problem of the police tendency to undermine assertions of counsel by judicially categorizing post-invocation police questioning of a suspect as proper "clarification" when that questioning is of dubious legitimacy. For example, in *State v. Robtoy*, 653 P.2d 284, 289-91 (Wash. 1982), the police responded to a suspect who said, "Maybe I should call a lawyer," by warning him, "Do you understand that once you say you want an attorney, you know, we have to stop talking. It's going to be difficult to change and go back and forth." Despite the obviousness of the interrogator's ploy to discourage the suspect from asserting his right to counsel, the reviewing court found this response to be proper "clarification." Because courts have approved such police attempts to dissuade suspects from asserting their rights as mere "clarification,"[47] the police are understandably encouraged to engage in more of this type of coercive "clarification" in future interrogations.

In a similar fashion, appellate courts have legitimized post-assertion clarifying interrogation by interpreting

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[47] *See, e.g., Nash v. Estelle*, 597 F.2d 513, 516-20 (5th Cir.), *cert. denied*, 444 U.S. 981 (1979) (approving as proper clarification, "Okay. I had hoped that we might talk about this, but if you want a lawyer appointed, then we are going to have to stop right now. . . . Well, I can talk about it with you and I would like to, but if you want a lawyer, well, I am going to have to hold off, I can't talk to you. It's your life."); *State v. Mada*, 812 P.2d 1107, 1108 (Ariz. App. 1991) (suspect twice told police "My attorney told me not to talk with you;" police response to suspect, "I told him that he had to knock this type of activity off, that sooner or later doing the things that he was doing was going to get him into a situation that he absolutely could not control. . . . The decision [to answer police questions] is yours. Your attorney cannot order you to be quiet. That decision is totally yours," approved as proper clarification).

fairly definite assertions of the right to counsel to be merely "equivocal," thus condoning follow-up clarifying questions by the police that would otherwise have rendered subsequent statements by the suspect inadmissible. Among the assertions of the right to counsel that have been found by reviewing courts to be merely "equivocal" are: "This is a lie. I'm calling an attorney;"[48] "If [I am] a suspect in a murder, [I] want to consult with a lawyer;"[49] "I believe gentlemen that if this is going to get into something deep where you're attempting to get me to incriminate myself then I should have an attorney present. If there is any questioning on that particular subject."[50] As long as post-invocation police questioning can be characterized as clarifying, many courts have gone to great lengths to classify the invocation as equivocal.[51]

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[48] *State v. Griffin*, 754 P.2d 965, 966-69 (Utah Ct. App. 1988).

[49] *State v. Robinson*, 427 N.W.2d 217, 221-23 (Minn. 1988).

[50] *State v. Lewis*, 645 P.2d 722, 726-27 (Wa. App. 1982). During the initial Miranda warnings, the suspect responded to being informed of his right to counsel with "We'll cross that bridge when we come to it," and to prosecuting investigator's statement, "Keeping these rights in mind, would you like to waive these rights and talk?" with "No. I'm not going to waive any rights, a a a [sic] I'll just wait until I know what's happening." Several questions about the crime were then asked, when a deputy prosecutor interrupted to say: "Let me interject something here, before you go forward since Mr. Lewis has indicated that he isn't sure whether or not he wants to waive his right to remain silent and right to the presence of an attorney, you might get some clarification on that," to which the suspect responded, "I believe gentlemen that if this is going to get into something deep where you're attempting to get me to incriminate myself then I should have an attorney present, If there is any questioning on that particular subject." Held, this was only an equivocal assertion of the right to counsel. *Id.* at 727.

[51] *See, e.g., State v. Anderson*, 553 A.2d 589, 593-95 (Conn. 1989) (suspect, confronted with damaging evidence against him by police, did not unequivocally invoke his right to counsel

When post-assertion questioning cannot be fairly characterized as merely "clarification," courts using the clarification standard may end up concluding that what seems to be an equivocal invocation was in fact not an invocation of any sort, equivocal or otherwise, thus relieving the police of the obligation to confine further interrogation to clarifying questions.[52] For example, in

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when he "indicate[d] that he better call his wife and lawyer"); *United States v. Gonzalez*, 833 F.2d 1464 (11th Cir. 1987) (suspect who told police that she had sought an attorney but it was too expensive to retain the attorney for assistance during the interrogation had only "ambiguously" requested counsel); *Sechrest v. State*, 705 P.2d 626, 629 (Nev. 1985) (suspect who told the police his lawyer had advised him to "keep his mouth shut" had at best only equivocallly invoked his rights); *Cheatham v. State*, 719 P.2d 612, 618 (Wyo. 1986) (suspect who answered police inquiry whether he would answer their questions with, "Well I don't care, I'd like to see a lawyer, too you know;" held to have only equivocallly invoked the right to counsel); *Long v. State*, 517 So.2d 664, 667 (Fla. 1987) (interpreting suspect's words "The complexion of things have sure changed since you came back into the room. I think I might need an attorney," as only an equivocal assertion of the right to counsel).

[52] Cases in which courts have found no invocation, whether equivocal or otherwise, include, *Kapocsi v. State*, 668 P.2d 1157, 1159-60 (Okla. Crim. App. 1983) ("I'm thinking I will need a lawyer" held not to be an invocation of the right to counsel); *Commonwealth v. Todd*, 563 N.E.2d 211, 213 (Mass. 1990) (suspect who "wondered aloud about the advisability of having a lawyer" did not invoke her right to counsel); *State v. Shifflett*, 508 A.2d 748, 758 (Conn. 1986) (suspect's discussion of his attorney's role in negotiating a "package deal" before he would talk about the crime, held not to be invocation of right to counsel); *State v. Summers*, 325 S.E.2d 419, 425-26 (Ga. 1984) (suspect's statement to the police that his wife had informed him to get a lawyer was not an assertion of the right to counsel); *State v. Lopez*, 822 P.2d 465, 469-70 (Ariz. 1991) (suspect's statement that "he shouldn't be talking to me and his attorney was out of town," not an invocation of the right to counsel); *State v. Mada*,

Daniel v. State, 644 P.2d 172, 177 (Wyo. 1982) the suspect told interrogating officer that he would "probably like to have an attorney present." After further discussion of the right to counsel, he explained his earlier request by saying to the police, "If it's necessary, that's because I just don't want to be taken advantage of or anything like that." Later, after being asked to sign a *Miranda* waiver form, the suspect reiterated his request, "May I still – if I can't afford a lawyer – may I still be appointed a lawyer?" Despite these repeated statements by the suspect indicating his desire for counsel, the reviewing court nevertheless found that he had not invoked his right to counsel at all. Likewise, in *State v. Campbell*, 367 N.W.2d 454, 458 (Minn. 1985), a suspect who said "If I'm going to be charged with murder, maybe I should talk to an attorney" was held not to have even equivocally asserted her right to counsel. Nor, according to the appellate court, did the defendant in *United States v. Ivy*, 929 F.2d 147, 152 (5th Cir. 1991), when he responded to the police asking him, "Who can you get dynamite from?" with "I'll tell you, let me talk to my lawyer before I answer that." Taken in context, these suspects' statements appear to be at least equivocal invocations of the right to counsel. The police

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812 P.2d 1107, 1108 (Ariz. App. 1991) (suspect twice telling police "My attorney told me not to talk with you," did not invoke his right to counsel); *State v. Bledsoe*, 658 P.2d 674, 676 (Wash. App. 1983) (suspect's statement to the police that his attorney had told him not to talk to the police about the case held to be no invocation of the right to counsel); *Wernert v. Arn*, 819 F.2d 613 (6th Cir. 1987) (suspect's statement to the custodial officer that her husband would telephone an attorney, and suspect's own unsuccessful attempts to reach an attorney by phone, were not an invocation of the right to counsel); *Massengale v. State*, 710 S.W.2d 594, 598 (Tex. Cr. App. 1984) (suspect who, in earshot of police, told his wife to retain a lawyer for him, did not invoke his right to counsel); *United States v. Gordon*, 655 F.2d 478 (2d Cir. 1981) (unsuccessful attempt to contact attorney was not a valid invocation of the right to counsel).

follow-up questioning in each case was apparently so patently beyond clarification, however, that only by refusing to recognize the invocations to be even equivocal could the appellate courts find later incriminating statements to be admissible evidence.

The clarification standard thus encourages appellate courts to indulge in tortured interpretations of invocations as "equivocal" and of police follow-up questioning as "clarification" in order to justify admitting into evidence the suspect's subsequent incriminating statements. In practice, then, the clarification approach frequently turns out to be scarcely more generous in its protection of individual rights than is the threshold-of-clarity standard.

C. The per se standard, treating all apparent invocations of the right to counsel as fully effective, gives identical constitutional protection to all individuals, regardless of the speech patterns they use.

Under the per se standard, apparent requests for counsel by an arrestee are considered to be effective invocations of the right to counsel, and pursuant to *Edwards*, police must cease all further interrogation.[53]

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[53] Cases applying this standard include: *State v. Furlough*, 797 S.W.2d 631, 638-39 (Tenn. Ct. App. 1990); *Hunt v. State*, 632 S.W.2d 640, 642 (Tex. Crim. App. 1982); *Ochoa v. State*, 573 S.W.2d 796, 800-01 (Tex. Cr. App. 1978); *People v. Hinds*, 201 Cal. Rptr. 104, 109 (Ct. App. 1984); *People v. Russo*, 196 Cal. Rptr. 466, 469 (1983); *People v. Duran*, 189 Cal. Rptr. 595, 599 (Ct. of App. 1983); *People v. Munoz*, 148 Cal. Rptr. 165, 166 (Ct. App. 1978); *People v. Superior Court of Mono County* (*ex rel.* Zolnay), 125 Cal. Rptr. 798, 802-03, 542 P. 2d 1390, 1394-95 (1975), *cert. denied*, 429 U.S. 816 (1976); *Maglio v. Jago*, 580 F.2d 202, 205 (6th Cir. 1978); *People v. Plyler*, 272 N.W.2d 623, 625-26 (Mich. 1978); *People v. Cerezo*, 635 P.2d 197, 198 (Colo. 1981); *People v. Traubert*, 608 P.2d 342, 346 (Colo. 1980); *State v. Blakney*, 605 P.2d 1093, 1097 (Mont.

Whereas the threshold-of-clarity rule requires courts to construe any arguable lack of clarity or precision on the part of the suspect against finding an effective invocation of the right to counsel, this approach instructs the reviewing court to interpret any cognizable request for counsel by a suspect, regardless of its linguistic form, as a fully effective invocation of the Fifth Amendment right. The per se invocation rule thus gives legal effect to a much broader spectrum of speech patterns expressing a desire for counsel than do the threshold-of-clarity and clarification standards. There is no justification for making the scope of an individual's constitutional rights arbitrarily turn upon whether he used the right "magic words" in invoking his rights. But there is even less reason to adopt such a rule when its application will work to the disadvantage of discrete groups within the population such as women and ethnic minorities, who are least apt to frame their requests for counsel in the direct and assertive language favored by the threshold-of-clarity and clarification standards. Adopting the per se standard for judging the adequacy of invocations will ensure that all persons receive the same level of constitutional protections irrespective of the speech patterns that they happen to employ to express themselves.

V. The Bright Line Per Se Standard Requiring the Police to Respect All Invocations Gives the Best Guidance to Police and Reviewing Courts in Consistent Application of the Right to Counsel to All Individuals.

Under the per se standard, all apparent invocations of counsel automatically trigger the *Edwards* rule, and so provide the interrogating police with a simple rule governing interrogation procedures. In contrast, under either the threshold-of-clarity or the clarification standards, the

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1979); *State v. Elmore*, 500 A.2d 1089, 1092 (N.J. 1985); *United States v. Porter*, 764 F.2d 1, 6 (1st Cir. 1985).

police must make a case-by-case assessment of whether a particular suspect's request for counsel is ambiguous or equivocal, because the legal consequences of continued interrogation will turn on this initial determination. If the police incorrectly characterize the suspect's invocation, then continuation of the interrogation will be unconstitutional. Moreover, under the clarification standard, not only must the police first decide whether the invocation is sufficiently ambiguous to justify continued questioning, but they must also then limit their further interaction with the suspect to questions designed to clarify his intent.

Standards that require case-by-case factual assessments invariably result in more extensive adjudication than simpler bright line rules. In addition, such standards entail a risk that the factual assessments of various courts will result in inconsistent treatment of similarly situated individuals. As the cases discussed in this brief demonstrate, both the police and subsequent reviewing courts in jurisdictions using the threshold-of-clarity and clarification standards have been proven to be inconsistent in making these case-by-case determinations as to whether a particular invocation was ambiguous and as to whether further police questioning was appropriately limited. This Court adopted the bright line rules in *Miranda* and *Edwards* precisely to avoid such slippery factual determinations and the potential for inconsistent applications that they entail. *Amicus curiae* urges this Court to again adopt a bright line rule giving operative legal effect to all apparent invocations of the right to counsel in order to promote uniformity in the scope of protection that the Fifth Amendment accords to individuals in police custody, and certainty as to the boundaries of constitutional behavior for the future guidance of the police and of reviewing courts.

CONCLUSION

Amicus strongly recommends that this Court adopt the per se standard giving full legal effect to all cognizable requests for counsel by those undergoing custodial interrogation. By refusing to give full legal effect to invocations of *Miranda* rights unless they are framed in direct and assertive language, the threshold-of-clarity and clarification standards fail to validate the exercise of constitutional rights by those whose speech patterns differ from the linguistic norm. Those whose attempted invocations of their right to counsel are framed in a softer and less emphatic manner should not receive less favorable treatment under the law than those who express themselves in a direct and assertive way. This Court should hold that the degree of constitutional protection accorded to individuals does not depend upon their manner of speaking.

Only the per se rule, treating all cognizable requests for counsel as valid invocations of the right to counsel, would provide assertive and deferential suspects with equivalent legal protection from police interrogation procedures. For this reason, *amicus curiae* urges this Court to adopt the bright line rule that all requests for counsel, whatever the speech register in which they are framed, trigger the *Edwards* rule prohibiting further police-initiated interrogation until counsel has been provided.

Respectfully submitted,

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(5)

In The
Supreme Court of the United States
October Term, 1993

ROBERT L. DAVIS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF MILITARY APPEALS

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., AND THE NATIONAL SHERIFFS' ASSOCIATION, IN SUPPORT OF THE RESPONDENT.

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No. 92-1949

In The
Supreme Court of the United States
October Term, 1993

ROBERT L. DAVIS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF MILITARY APPEALS

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., AND THE NATIONAL SHERIFFS' ASSOCIATION, IN SUPPORT OF THE RESPONDENT.

This Brief is filed pursuant to Rule 37 of the United States Supreme Court. Consent to file has been granted by respective Counsel for the Petitioner and Respondent. The letters of consent have been filed with the Clerk of this Court, as required by the Rules.

INTEREST OF AMICI CURIAE

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties, and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* over eighty-five times in the Supreme Court of the United States and over thirty-five times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio, and Missouri.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 14,000 members in 72 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

The National District Attorneys Association, Inc. (NDAA), is a nonprofit corporation and the sole national organization representing local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publication, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all of our citizens.

The National Sheriffs' Association (NSA), is the largest organization of sheriffs and jail administrators in America,

consisting of over 40,000 members. It conducts programs of training, publications, and related educational efforts to raise the standard of professionalism among the Nation's sheriffs and jail administrators. While it is interested in the effective administration of justice in America, it strives to achieve this while respecting the rights guaranteed to all under the Constitution.

Amici are national professional associations representing the interests of law enforcement agencies at the state and local levels. Our members include: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility of conducting interrogations within the bounds of the law, and (2) prosecutors and police legal advisors who, in their criminal jurisdiction capacity, are called upon to advise law enforcement officers and administrators in connection with such matters and to prosecute cases involving evidence obtained thereby.

Because of the relationship with our members, and the composition of our membership and directors—including active law enforcement administrators and counsel—we possess direct knowledge of the impact of the ruling of the court below, and we wish to impart that knowledge to this Court.

ARGUMENT

WHEN A SUSPECT MAKES AN AMBIGUOUS COMMENT REGARDING COUNSEL DURING A CUSTODIAL INTERROGATION, LAW ENFORCEMENT OFFICERS SHOULD BE PERMITTED TO ASK QUESTIONS FOR THE PURPOSE OF CLARIFYING THE SUSPECT'S WISHES.

After the defendant in this case was advised of his *Miranda* rights while in custody, he stated, "Maybe I should talk to a lawyer." He was asked to clarify his statement and he said, "No, I don't want a lawyer." His interrogators then took a break to let him consider his situation and, following the break, resumed interrogation after an abbreviated reminder of his rights, whereupon defendant made incriminating admissions. The court below ruled that defendant's ambiguous statement, "Maybe I should talk to a lawyer," was not a *Miranda* invocation of the right to counsel and the interrogators were entitled to clarify the defendant's statement. "[B]ecause this comment by appellant did not unequivocally invoke his right to counsel, the NIS agents properly conducted further limited questioning to clarify appellant's ambiguous comment." *United States v. Davis*, 36 M.J. 337, 341 (CMA 1993).

Certiorari was granted by this Court to determine the question: "[W]hen a suspect makes an ambiguous request for counsel during a custodial interrogation, must the interrogator cease questioning until the suspect is provided with counsel?"

The defendant's argument in this case is essentially that whenever a suspect makes a reference to counsel—ambiguous or not—the only option open to the police is to provide him with an attorney before saying anything further

to him. That position has been rejected by the majority of the courts that have considered the issue of what the police are to do in the face of an ambiguous reference to counsel. In the context represented by this case, law enforcement officers must cease further interrogation, but they are allowed to ask the suspect questions specifically limited to clarifying his or her desire with respect to counsel. *See e.g.*, *United States v. March*, 999 F.2d 456 (10th Cir. 1993); *United States v. Mendoza-Cecelia*, 963 F.2d 1467, 1472 (11th Cir.), *cert. denied*, 113 S. Ct. 436 (1992); *Parker v. Singletary*, 974 F.2d 1562 (11th Cir. 1992); *Poyner v. Murray*, 964 F.2d 1404 (4th Cir. 1992); *United States v. Eaton*, 890 F.2d 511 (1st Cir. 1989); *United States v. Gotay*, 844 F.2d 971, 975 (2nd Cir. 1988); *Terry v. LeFevre*, 862 F.2d 409 (2nd Cir. 1988); *United States v. Fouche*, 776 F.2d 1398, 1405 (1985), appeal after remand, 833 F.2d 1284, 1287 (9th Cir. 1987), *cert denied*, 486 U.S. 1017 (1988); *United States v. McKinney*, 758 F.2d 1036 (5th Cir. 1985); *United States v. Porter*, 776 F.2d 370 (1st Cir. 1985) (en banc); *Nash v. Estelle*, 597 F.2d 513, 517 (5th Cir. 1979). *Contra*, *Maglio v. Jago*, 580 F.2d 202 (6th Cir. 1978).

The approach of the U. S. Court of Military Appeals, and most other courts as well, is a common sense resolution of the problem. It fully accommodates the rights of the subject, while at the same time preserves the interests of law enforcement and of the public welfare.

Under this rule, law enforcement officers are precluded from badgering suspects who have made an ambiguous statement; the questions after that point are strictly limited to clarifying the suspect's desires (not those of the police) on the issue of access to counsel. Only if the suspect makes it clear that he does not want counsel are the police permitted to continue an interrogation. The suspect's *Miranda* rights

are thus scrupulously protected. At the same time, the police may make a reasonable inquiry (essentially a "ministerial" inquiry as the *March* court, *supra*, called it) in order to ascertain the wishes of the suspect. **It should also be noted that while some arrests are followed by a flat refusal to answer an officer's questions and others produce an unequivocal waiver of rights, it is not uncommon for a bilateral dialogue to ensue, while a suspect considers his *Miranda* rights and options. *Amici* believe that a reversal in this case would adversely impair a very large number of otherwise admissible confessions.**

Amici submit that, in effect, what the defendant wants this Court to do is to create an absolute bar to clarification statements. This Court answered that attempt, although in the context of the Fifth Amendment privilege against self-incrimination, in *Michigan v. Mosley*, 423 U.S. 96, 102 (1975). It pointed out that a "blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of the circumstances, would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests."

We respectfully ask this Court not to unnecessarily adopt a rule that would add to the existing manifold protections presently enjoyed by criminal suspects, while measurably decreasing the ability of beleaguered law enforcement agencies to solve crimes.

CONCLUSION

Amici urge this Court to affirm the decision of the court below on the basis of the precedents of this Court and sound judicial policy; in the alternative, we submit that any error at the trial level was harmless beyond a reasonable doubt.

Respectfully submitted,

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IN THE

Supreme Court of the United States

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ROBERT L. DAVIS,
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Respondent.

On Writ of Certiorari to the United States Court of Military Appeals

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BRIEF OF *AMICI CURIAE* THE WASHINGTON LEGAL FOUNDATION AND THE ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

When a suspect makes an ambiguous request for counsel during a custodial interrogation, must the interrogator cease questioning until the suspect is provided with counsel?

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

No. 92-1949

ROBERT L. DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF OF *AMICI CURIAE* THE WASHINGTON LEGAL FOUNDATION AND THE ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit law and policy center with more than 100,000 members and supporters nationwide. WLF participates in litigation and administrative proceedings affecting the broad public interest, and has a particular interest in the areas of criminal justice and crime victims' rights. In that regard, WLF has participated as a party or *amicus curiae* in numerous cases before this Court. *See, e.g., Payne v. Tennessee*, 111 S. Ct. 2597 (1991).

The Allied Educational Foundation (AEF) is a nonprofit charitable and education foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including criminal law and public policy. AEF has appeared before this Court along with WLF in a number of cases raising constitutional issues.

Amici are deeply concerned about the proliferation of "prophylactic" rules that the Court has promulgated under the aegis of interpreting *Miranda v. Arizona*, 384 U.S. 436 (1966), without careful consideration of either the constitutional basis for such action or the destructive effects of those rules on victims of crime and society at large. *Amici* raise arguments in their brief not heretofore presented by the parties regarding the applicability of 18 U.S.C. 3501 to this case, and believe their brief will assist the Court in deciding this case.

This brief is filed with the written consents of the parties which are on file with the Clerk of the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner Robert L. Davis contends that incriminating statements obtained from him during custodial interrogation should have been suppressed at his court-martial under an extension of the "prophylactic" rules of *Miranda v. Arizona*, 384 U.S. 436 (1966), because he made an ambiguous request for counsel during custodial interrogation. Because Congressionally-enacted statutes require a different approach—both in federal prosecutions in general, *see* 18 U.S.C. 3501, and in military courts-martial in particular, *see* Articles 31 & 36, Uniform Code of Military Justice (U.C.M.J.), 10 U.S.C. 831, 836—this Court lacks authority to promulgate such a new prophylactic rule.[1]

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[1] These issues are "subsidiary questions fairly included" within the question presented. Court Rule 14.1(a). As explained in *Yee v. City of Escondido*, 112 S. Ct. 1522, 1533 (1992), an issue is "fairly included" unless it exists "side by side [with the question presented], neither encompassing the other." Section 3501 and the provisions of the Uniform Code of Military Justice we cite bear directly on the procedures to be followed during custodial interrogation in the military and the admissibility of statements obtained during such interrogation. If (as we argue) these Acts of Congress preclude any rule suppressing confessions after an ambiguous request for counsel, then that conclusion dictates the answer to the question petitioner presents. Moreover, when resolution of a "question of law is a predicate to an intelligent resolution of the question on which [the Court] granted certiorari," it can be regarded as fairly comprised within it. *Vance v.* (continued...)

This Court has held that the prophylactic *Miranda* rules "sweep[] more broadly than the Fifth Amendment itself." *Oregon v. Elstad*, 470 U.S. 298, 306 (1985). Most significantly, this means that the government can violate *Miranda* without actually violating the Fifth Amendment. *See, e.g., Michigan v. Tucker*, 417 U.S. 433, 443-44 (1974).

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[1] (...continued)
Terrazas, 444 U.S. 252, 258-59 n.5 (1980) (internal quotation omitted). *See Arcadia, Ohio v. Ohio Power Co.*, 498 U.S. 73, 77 (1990); *Procunier v. Navarette*, 434 U.S. 555, 559-60 n.6 (1978). In this case it would make no sense for the Court to address the procedures for handling ambiguous requests for counsel in military interrogations without addressing the governing statutes on this point.

Moreover, there is greater freedom in *responding* to a question presented, because a respondent may, without cross petitioning, "urge any grounds which would lend support to the judgment below," *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 419 (1977), including "grounds different from those upon which the court below rested its judgment." *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940). Davis will suffer no prejudice from the Court considering our line of analysis, since he will have every opportunity to provide any necessary amplification of his position in his reply brief and in oral argument. Indeed, Davis may have had an ethical duty to call the statutory provisions we discuss to the attention of this Court (and the courts below). *Cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-23.

The fact that WLF appears as an *amicus curiae* in this case does not alter the application of any of the above-recited principles. While an *amicus* may not change the question presented, an *amicus* can surely present a different line of argument on that question. *See* Court Rule 37.1. The Court has relied on arguments provided by *amici* that were not made by the parties in a case. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 1658 (1991) (Stevens, J., dissenting) (collecting examples); *Teague v. Lane*, 489 U.S. 288, 300 (1989).

Finally, even if the arguments we raise are somehow deemed to be outside the question presented, the Court remains entirely free to reach them, as the question-presented limitation is purely prudential and in no way affects the Court's jurisdiction. *See Procunier v. Navarette*, 434 U.S. 555, 559-60 n.6 (1978). On the other hand, the Court may not be so free to ignore the arguments we raise, because it appears that Section 3501 denies the Court authority to grant the relief petitioner requests, *i.e.*, suppression of his incriminating statements. *See* 18 U.S.C. 3501 (mandatory language requiring that incriminating statements "shall be admissible in evidence" if voluntary).

Even the *Miranda* right to counsel is only a procedural safeguard to assure that compulsion does not materialize.

Because the *Miranda* rules extend beyond the Fifth Amendment, they are susceptible to review and limitation by Congress. In 18 U.S.C. 3501,[2] Congress has determined that all incriminating statements that are "voluntarily given" must be admitted in federal prosecutions despite any ambiguous request for counsel. Because the Fifth Amendment is not infringed by such a determination, this Court is without power to suspend the Congressional judgment and forbid the introduction of voluntary statements made after an ambiguous request for counsel.

The prophylactic rule requested by Davis is also outside the power of this Court because Congress and the President have promulgated specific rules and procedures for the conduct of military courts-martial. This Court must be particularly wary of intruding on the power of the Congress and the Commander-in-Chief over courts-martial. Under Article 31 of the Uniform Code of Military Justice, 10 U.S.C. 831, there is no requirement that an interrogator suspend questioning following an ambiguous request for counsel. Likewise, the Military Rules of Evidence promulgated by the President, pursuant to his authority under Article 36 of the U.C.M.J., 10 U.S.C. 836, do not allow the suppression of such incriminating statements. *See* Mil. R. Evid. 304, 305, 402.

Even if this Court has the authority to promulgate the prophylactic rule requested by Davis, it should exercise great caution before doing so. The best available evidence suggests the provisional estimate that the prophylactic *Miranda* requirements announced to date result in the loss of tens of thousands of prosecutable cases against dangerous criminals every year. The expansion of the rules suggested by Davis can only aggravate these alarming costs. Moreover, any expansion of the *Miranda* prophylaxis will

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[2] In an oral argument last Term, the Court asked numerous questions about 18 U.S.C. 3501 and received unilluminating answers. *See* Official Transcript of Proceedings before the United States Supreme Court of the United States at 18-21 & 27-28, *United States v. Green*, No. 91-1521 (Nov. 30, 1992), *cert. dismissed as moot*, 113 S.Ct. 1835 (1993).

further preempt the custodial interrogation field and dim the prospect for the exploration of superior means of balancing the interests of society and criminal suspects.

ARGUMENT

I. THE *MIRANDA* GUIDELINES ARE NOT THEMSELVES CONSTITUTIONAL REQUIREMENTS BUT RATHER ARE MERE "PROPHYLACTIC" RULES.

This Court has emphasized that the *Miranda* procedures are not themselves constitutional rights or requirements. Rather, they are only "suggested safeguards" whose purpose is to reduce the risk that the Fifth Amendment's prohibition of compelled self-incrimination will be violated in custodial questioning. This means that the government can violate *Miranda* without actually violating the Fifth Amendment—without, that is, having compelled a defendant to become a witness against himself. As explained in *Michigan v. Tucker*, 417 U.S. 433 (1974), *Miranda* established a "series of recommended 'procedural safeguards' . . . . The [*Miranda*] Court recognized that these procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected." *Id.* at 443-44. Thus, in *Tucker*, the Court excused non-compliance with *Miranda* because failure to provide a full set of warnings "did not abridge respondent's constitutional privilege . . . but departed only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege." *Id.* at 446. *See Withrow v. Williams*, 113 S. Ct. 1745, 1752-53 (1993) (collecting numerous cases describing *Miranda* rights as "'prophylactic' in nature").[3] Quite simply, to violate any aspect of *Miranda*

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[3] *Withrow* refused to extend the equitable rule of *Stone v. Powell*, 428 U.S. 465 (1976), to *Miranda* claims, largely on prudential grounds. *See Withrow*, 113 S.Ct. at 1754. While *Withrow* says much about the meaning of *Stone*, it says nothing about the issue addressed in this case: the limited reach of a prophylactic rule in the face of an Act of Congress to the contrary.

is not necessarily—or even usually—to violate the Constitution.

It is sometimes said that *Miranda* established a "presumption of compulsion." *See Oregon v. Elstad*, 470 U.S. 298, 307 (1985). This description is fully consistent with viewing *Miranda* as a sub-constitutional doctrine. Despite the so-called "irrebuttable" presumption, *id.* at 307, statements taken in violation of *Miranda* may be used to impeach a testifying defendant's credibility. *See Oregon v. Hass*, 420 U.S. 714, 723 (1975); *Harris v. New York*, 401 U.S. 222, 226 (1971). But statements that are truly involuntary or compelled are not admissible for impeachment purposes. *See, e.g., Mincey v. Arizona*, 437 U.S. 385, 397-98 (1978). Likewise, doctrines other than impeachment turn on whether the Fifth Amendment or merely *Miranda*'s prophylactic rules were violated. Thus, while this Court applies true fruit of the poisonous tree analysis to actual violations of the Constitution, it has held that such analysis is inappropriate when the antecedent wrong is merely a violation of *Miranda's* prophylaxis. *See Oregon v. Elstad*, 470 U.S. at 317-18; *Michigan v. Tucker*, 417 U.S. at 450-52. Finally, when the Court created a public safety exception to *Miranda*, it took pains to explain that it was not creating an exception to the Fifth Amendment. *See New York v. Quarles*, 467 U.S. 649, 655 n.5 (1984). Public safety may justify a departure from *Miranda*'s prophylaxis, but such considerations can not justify actually compelling a defendant to be a witness against himself.

All these cases demonstrate that a violation of the Fifth Amendment is not conclusively presumed to be present when *Miranda* is violated. Instead, actual compulsion in violation of the Fifth Amendment exists only where law enforcement has transgressed the standards established by the traditional voluntariness test. *See New York v. Quarles*, 467 U.S. at 654-55 & n.5, 658 n.7; *Oregon v. Elstad*, 470 U.S. at 306-09; *Michigan v. Tucker*, 417 U.S. at 444-45. In the absence of such compulsion, there is no constitutional impediment to admitting a suspect's statements despite non-compliance with *Miranda*. *See New York v. Quarles*, 467 U.S. at 654-55 & n.5, 658 n.7. *See generally* J. GRANO, CONFESSIONS, TRUTH, AND THE LAW 173-198 (1993).

The rule that Davis asks this Court to promulgate for ambiguous requests for counsel during custodial questioning would clearly be prophylactic in nature. This Court has held repeatedly that the Sixth Amendment right to counsel does not attach until a suspect is formally accused and that the *Miranda* right to counsel at the earlier stage of custodial questioning is only a suggested safeguard against coercion that the Constitution does not require. *See, e.g., Moran v. Burbine*, 475 U.S. 412, 424-25 (1986). Thus, Davis's ambiguous request for counsel during custodial questioning invoked, at best, not any constitutional claim of right but merely a sub-constitutional safeguard stemming from this Court's *Miranda* decision.

II. TITLE 18, SECTION 3501 TRIMS THE REACH OF THE PROPHYLACTIC *MIRANDA* RULES AND REQUIRES THE ADMISSION OF DAVIS'S VOLUNTARY STATEMENTS.

A. Section 3501 Requires the Admission of Voluntary Statements Like the Statements Made by Davis.

In 1968 Congress enacted section 3501 of Title 18—Title II of the 1968 Omnibus Safe Streets and Crime Control Act, 82 Stat. 197 (1968)—to supersede the *Miranda* rules as conditions on the admission of statements made by suspects in custodial questioning and to restore the traditional voluntariness standard for the admission of such statements. This purpose is plain on the face of the statute and was clearly understood during Congress's consideration of the legislation that became Section 3501. *See, e.g., Controlling Crime Through More Effective Law Enforcement: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 74, 110-11, 185, 194, 269-70, 579, 619-20, 849, 1173-77 (1967); S. REP. No. 1097, 90th Cong., 2d. Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N. 2123, 2127-38.

Suppression of Davis's voluntary statements is unlawful under this statute. Section 3501(a) provides that "in any criminal prosecution brought by the United States . . . a confession *shall be admissible* in evidence if it is voluntarily

given" (emphasis added). Section 3501(b) directs the trial court to consider "all the circumstances surrounding the giving of the confession" in deciding on its admission, including a number of enumerated factors, such as the defendant's receipt or awareness of the type of information conveyed in *Miranda* warnings. These factors, however, are only to be considered as evidence "in determining the issue of voluntariness," and the statute states expressly that "[t]he presence or absence of any of the . . . factors . . . need not be conclusive on the issue of voluntariness of the confession." 18 U.S.C. 3501(b). As the legislative history of Section 3501 explains, under subsection (b) "the trial judge must take into consideration all the surrounding circumstances in determining the issue of voluntariness, including specifically enumerated factors which historically enter into such a determination. Whether or not the arrested person was informed of or knew his rights before questioning is but one of the factors." S. REP. No. 1097, 90th Cong., 2nd Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2137. In other words, the significance of the factors enumerated in subsection (b) under the statute is simply the same as their significance in the traditional voluntariness case law. *Cf., e.g., Crooker v. California*, 357 U.S. 433, 438 (1958).

There can be no credible suggestion that Davis's statements were anything other than voluntary. The only claim that he raises concerns the effect of an ambiguous remark alluding to an attorney: "Maybe, I should talk to a lawyer." Pet. Br. at 15. Questioning after such a comment is a far cry from violating the Fifth Amendment by extracting an "involuntary" confession.

B. Congress Acted Within Its Powers in Modifying *Miranda*'s Prophylactic Rules.

Section 3501 complies with the Constitution. Since the *Miranda* rules are not of constitutional stature, Congress possesses the power to modify or even abrogate them. This conclusion does not require accepting any general congressional power to pass a statute overturning a constitutional decision. But the decision at issue in this case—*Miranda v. Arizona*—is no ordinary constitutional

decision. Rather, as already discussed, *Miranda* promulgated prophylactic rules that can be violated without violating the Constitution. It is generally accepted that Congress has the final say regarding the rules of evidence and procedure in federal courts.[4] Of course, Congress cannot enact a rule of evidence that violates the Constitution. Section 3501, however, permits the introduction of only statements that are voluntary. The statute in effect simply rejects a rule of evidence that goes beyond constitutional requirements.

This Court has repeatedly held that courts must abide by a Congressional decision despite any judicially-created procedural or evidentiary rules that have previously been applied. For example, the Court has upheld Congressional modification of a Court-promulgated rule concerning prosecution production of impeaching materials on government witnesses, explaining that "[t]he statute as interpreted does not reach any constitutional barrier." *Palermo v. United States*, 360 U.S. 343, 353 n.11 (1959). *Accord United States v. National City Lines*, 334 U.S. 573, 588-89 (1948) ("Our general power to supervise the administration of justice in the federal courts . . . does not extend to disregarding a validly enacted and applicable statute . . . ."); *see also Wolfle v. United States*, 291 U.S. 7, 13 (1934); *Funk v. United States*, 290 U.S. 371, 382 (1933); *Livingston v. Story*, 34 U.S. (9 Pet.) 632, 655-56 (1835); *Wayman v. Southard*, 23 U.S (10 Wheat.) 1, 22 (1824). *See generally* J. GRANO, CONFESSIONS, TRUTH, AND THE LAW 173-222 (1993); Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1521 (1984) ("the federal courts have no authority to exclude evidence . . . unless the government's conduct violated the Constitution").

In reviewing the constitutionality of an Act of Congress, the Court assumes "the gravest and most delicate duty . . . [it] is called on to perform." *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J.). Section 3501 does

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[4] Accordingly this case presents no question about the reach of *Miranda* in state court cases.

nothing more than require the admission of statements in accordance with the applicable constitutional standard (voluntariness or non-compulsion) rather than the prophylactic standards suggested in the *Miranda* decision. Thus, invalidating Section 3501 would require an unprecedented and inexplicable finding that a statute is unconstitutional where it neither requires nor authorizes anything that the Constitution prohibits.[5] The Tenth Circuit was accordingly correct in concluding that "*Michigan v. Tucker* . . . although not involving the provision of § 3501 . . . did, in effect, adopt and uphold the constitutionality of the provisions thereof." *United States v. Crocker*, 510 F.2d 1129, 1137 (10th Cir. 1975). *See* Note, United States v. Crocker—*Setting the Stage for Miranda's Last Act?*, 47 U. COLO. L. REV. 279, 295 (1976).[6]

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[5] It is sometimes said that *Miranda*'s prophylactic approach is justified because deciding voluntariness issues on a case-by-case basis is beyond the ken of judges and is time consuming. *See, e.g.*, Schulhofer, *Reconsidering* Miranda, 54 U. CHI. L. REV. 435, 451-53 (1987). It is clear, however, that federal courts can—and do—make such determinations quite frequently, *e.g.*, before allowing a defendant to be impeached with a statement obtained in violation of *Miranda*. Moreover, even if voluntariness determinations are difficult to make, the mere administrative convenience of the courts cannot possibly justify overturning an Act of Congress.

[6] There are no decisions to the contrary. Appellate courts in some other cases have also excused *Miranda* violations when presented with the argument that admission is required under 18 U.S.C. 3501, while declining to address the question of the statute's effect directly. *See, e.g.*, *United States v. Goudreau*, 854 F.2d 1097, 1098 (8th Cir. 1988); *United States v. Vigo*, 487 F.2d 295, 298-99 (2d Cir. 1973); *Ailsworth v. United States*, 448 F.2d 439, 440-41 (9th Cir. 1971). *Miranda*-related cases decided by the Court in recent years have generally involved state proceedings to which Section 3501 does not apply. The Court has cited Section 3501 in several cases without any indication of constitutional infirmity. *See Crane v. Kentucky*, 476 U.S. 683, 689 (1986); *United States v. Raddatz*, 447 U.S. 667, 678 (1980); *Brown v. Illinois*, 422 U.S. 590, 604 (1975); *Keeble v. United States*, 412 U.S. 205, 208 n.3 (1973); *Lego v. Twomey*, 404 U.S. 477, 486 n.14 (1972) (quoting Section 3501 in full).

Many observers have reached the same conclusion. Of greatest interest is a report by the United States Department of Justice, which explained:

> *Miranda* should no longer be regarded as controlling [in federal cases] because a statute was enacted in 1968, 18 U.S.C. § 3501 . . . . Since the Supreme Court now holds that *Miranda*'s rules are merely prophylactic, and that the fifth amendment is not violated by the admission of a defendant's voluntary statements despite non-compliance with *Miranda*, a decision by the Court invalidating this statute would require some extraordinarily imaginative legal theorizing of an unpredictable legal nature.

OFFICE OF LEGAL POLICY, U.S. DEPARTMENT OF JUSTICE, REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRE-TRIAL INTERROGATION 103 (1986).[7] Most of those who testified before Congress in 1968 reached the same conclusion. *See* S. REP. No. 1097, 90th Cong., 2nd Sess. (1968), *reprinted in*, 1968 U.S.C.C.A.N. 2112, 2137. More recently many respected authorities have expressed similar opinions.[8] In

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[7] We assume that the Department of Justice will also defend the validity of Section 3501 before the Court, since it has not given the statutorily-required notice to Congress of any intention to refrain from doing so, *see* Pub. L. No. 96-132, § 21, 93 Stat. 1049-50 (1979), extended to current fiscal year in Pub. L. 103-121, § 102, 107 Stat. 1163 (1993), and since it has previously urged the Court to admit statements under this Act of Congress, *see, e.g.*, Brief for the United States at 17-23, *United States v. Jacobs*, No. 76-1193, *cert. dismissed as improvidently granted*, 436 U.S. 31 (1978).

[8] *See, e.g.*, J. GRANO, CONFESSIONS, TRUTH, AND THE LAW 203 (1993); J. DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE 295 (1991); Grano, Miranda*'s Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U. CHI. L. REV. 174, 176 (1988); Markman, *The Fifth Amendment and Custodial Questioning: A Response to "Reconsidering* Miranda*"*, 54 U. CHI. L. REV. 938, 948 (1987); Lippman, Miranda v. Arizona: *Twenty Years Later*, 9 CRIM. JUST. J. 241, 282 (1987); Johnson, *A Statutory Replacement for the* Miranda *Doctrine*, 24 AM.

(continued...)

sum, Section 3501 is a constitutional exercise of Congress' authority to trim back a Supreme Court decision creating mere "prophylactic" rules that extend beyond the Constitution.[9]

C. Section 3501 Applies to Military Prosecutions.

Section 3501 applies to federal military prosecutions. Congress chose to apply Section 3501 to "any criminal prosecution brought by the United States . . . ." 18 U.S.C. 3501(a). There can be little doubt that Davis is the defendant in a criminal prosecution brought by the United States—as the case caption in this action confirms. The reach of a Congressional enactment is determined by examining its plain meaning. *See, e.g., Union Bank v. Wolas*, 112 S. Ct. 527, 531 (1991). Since Congress has not limited the reach of the statute, its plain language—"any

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[8] (...continued)
CRIM. L. REV. 303, 307 n.8 (1987); Fein, *Congressional and Executive Challenge of* Miranda v. Arizona, in CRIME AND PUNISHMENT IN MODERN AMERICA 171, 180 (P. McGuigan & J. Pascale eds. 1986); Caplan, *Questioning* Miranda, 38 VAND. L. REV. 1417, 1475 & n.271 (1985); Inbau, *Over-Reaction—The Mischief of* Miranda v. Arizona, 73 J. CRIM. L. & CRIMINOLOGY 797, 809 (1982). *But see, e.g.*, 1 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 6.5(e) at p. 487 (1984 & 1991 Supp.).

[9] An entirely separate argument for the constitutionality of Section 3501 is based on the fact that Congress has now rejected the factual findings underpinning *Miranda*'s conclusion that custodial interrogation has an "inherently compelling" character. *Compare Miranda*, 384 U.S. at 457-58 *with* S. REP. NO. 1097, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. 2112, 2134. *See generally* Burt, Miranda *and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81, 118-34; Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 42 n.217 (1975); American Law Division, Legislative Reference Service, Brief in Support of Constitutionality of Bill Limiting Jurisdiction of Federal Courts in Confession Cases, *reprinted in* 1968 U.S.C.C.A.N. 2146-49; *Controlling Crime Through More Effective Law Enforcement: Hearings Before the Subcomm. on Criminal Laws of the Senate Judiciary Comm.*, 90th Cong., 1st Sess. 925 (1967). Because (as argued here) Section 3501 is a constitutional modification of mere prophylactic rules, the Court need not reach this alternative ground for upholding the statute.

criminal prosecution brought by the United States"—applies to the prosecution of Davis.

The plain meaning of the statute is fully confirmed by "the design of the statute as a whole and . . . its object and policy." *Crandon v. United States*, 494 U.S. 152, 158 (1990). There can be little doubt that Congress designed Section 3501 to limit "the harmful effects" of *Miranda*. *See* S. REP. NO. 1097, 90th Cong., 2nd Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2127. As the Senate Report explained, "Crime will not be abated so long as criminals who have voluntarily confessed to their crimes are released on mere technicalities." *Id.* at 2123. In view of this manifest intent, excluding military prosecutions from the ambit of the statute would require the extraordinary conclusion that Congress intended to protect crime victims in cases involving civilian criminal suspects while continuing to allow criminals victimizing the military community to be released on "mere technicalities."

One military court has stated, in *dicta*, that Section 3501 does not supersede the protections provided in Article 31 of the U.C.M.J. *United States v. Gilliard*, 42 C.M.R. 1029, 1033-34 (A.F.C.M.R. 1970) (*dicta*), *aff'd without discussion of this issue*, 20 C.M.A. 534 (1971). Whatever the merits of that conclusion, it has no application to Davis's claim. This case does not present a conflict between Section 3501 and Article 31. To the contrary, the same result is reached under both enactments. *Compare* Part II.A., *supra* (Section 3501 requires the admission of Davis's voluntary statements) *with* Part III.A, *infra* (Article 31 requires the admission of Davis's voluntary statement).[10]

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[10] In the wake of the *Miranda* decision, the U.S. Court of Military Appeals held that *Miranda* applied to military prosecutions. *See United States v. Tempia*, 16 C.M.A. 629 (1967). The basis for this holding was that in *Miranda* "the Court was laying down constitutional rules for criminal interrogation which are part and parcel of the Fifth Amendment." *Id.* at 635. The Court of Military Appeals does not appear to have specifically revisited this issue since Congress adopted Section 3501 in 1968 or since this Court has repeatedly characterized the *Miranda* rules as not "part and parcel of the Fifth Amendment," but rather prophylactic in nature. Thus, the *Tempia* decision has no bearing on the issues discussed here.

Entirely apart from the reach of Section 3501, Congress and the President have independently incorporated the statute into military procedure. In Article 36 of the U.C.M.J., Congress allowed the President to prescribe rules of trial procedures for courts-martial "which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts . . . ." Pursuant to this power, the President has promulgated Military Rule of Evidence 101(b)(1), which requires courts-martial to apply "the rules of evidence generally recognized in the trial of criminal cases in the United States district courts." The intent of Rule 101(b)(1) is to keep military practice and federal court practice from diverging unless there is some specifically articulated reason for doing so. *See* Mil. R. Evid. 101(b)(1), Drafters' Analysis. Since Section 3501, like all other statutes of general applicability, extends to all federal civilian criminal trials, *see* Part II.A, *supra*, it has been assimilated into military law through Rule 101(b)(1) of the Military Rules of Evidence.

III. PROPHYLACTIC SAFEGUARDS MAY NOT SUPERSEDE CONGRESSIONALLY-MANDATED RULES FOR THE CONDUCT OF MILITARY COURTS-MARTIAL.

A. Congress Has Promulgated Rules for Conducting Military Courts-Martial That Do Not Require Investigators to Clarify Ambiguous Requests for Counsel.

The rules for the conduct of military courts-martial do not require clarification of ambiguous requests for counsel as a precondition to admitting voluntary statements. Former Operations Specialist Seaman Apprentice Davis challenges a general court-martial conducted under Article 118 of the Uniform Code of Military Justice, 10 U.S.C. 918. The U.C.M.J. stems from Congress' power under the Constitution "to make rules for the government and regulation of the land and naval forces." U.S. Const., Art. I, § 8. The U.C.M.J. represents Congressional rulemaking and itself provides some evidentiary rules. For present

purposes, the most important of these is Article 31, which represents the Congressional judgment as to the circumstances under which statements from the accused may be admitted in court-martial proceedings.

In Article 31, Congress provided rules governing confessions that are more limited than the *Miranda* requirements. The salient portion of the Article is:

> (b) No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

Art. 31(b), U.C.M.J., 10 U.S.C. 831(b).

As is readily apparent, in Article 31 Congress provided for warnings of the right to remain silent, but made no provision for furnishing counsel during questioning—much less provision for counsel upon an ambiguous request. Accordingly, Davis's statements were obtained in compliance with the procedures Congress has specified in the U.C.M.J.[11]

In the Uniform Code of Military Justice, Congress not only set out certain procedures for courts-martial but also authorized the President—not the courts—to prescribe more detailed rules governing pretrial, trial, and post-trial procedures. *See* Art. 36, U.C.M.J., 10 U.S.C. 836. In turn, the President has exercised his powers under this statute and as Commander-in-Chief of the armed forces, U.S. Const., Art. II, § 2, by promulgating the *Manual for Courts Martial*, which contains the Military Rules of

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[11] Davis acknowledges this limitation and rather coyly states that he "does not seek any relief in this Court on the basis of Article 31(b)." Pet. Br. at 5 n.7. However, he does not address whether the limitation of Article 31(b) affects the power of this Court to grant any relief.

Evidence. Exec. Order No. 12,198, 3 C.F.R. 151 (1981). Of particular importance to Davis's suppression motion, the Military Rules of Evidence set forth quite detailed procedures concerning confessions. *See* Mil. R. Evid. 304, 305. In fact, it is fair to say that these rules codify the bulk of the *Miranda* requirements.

The Military Rules of Evidence adopted by the Commander-in-Chief, however, do not contain any requirement for military investigators to clarify ambiguous requests for counsel. Rule 305(f) provides instead that questioning shall stop "[i]f a person chooses to exercise . . . the right to counsel under this rule . . . ." *See also* Mil. R. Evid. 305(d)(2). The Military Rules of Evidence likewise make no provision for the suppression of statements obtained after an ambiguous request for counsel. *See* Mil. R. Evid. 304(a) ("involuntary" statements shall not be received in evidence); Mil. R. Evid. 304(c)(3) (defining "involuntary" statement).

The Military Rules of Evidence require the admission of all relevant evidence unless there is a basis for exclusion in some specifically-identified source. Military Rule of Evidence 402 provides broadly that "[a]ll relevant evidence is admissible, except as otherwise provided by (1) the Constitution of the United States as applied to members of the armed forces, (2) the code, (3) these rules, (4) this Manual, or (5) any Act of Congress applicable to members of the armed forces" (numbers inserted). There can be little doubt that Davis's incriminating statements were "relevant" to proving he was a murderer. *See* Mil. R. Evid. 401. Thus, for Davis to establish a ground for exclusion, he must prove that he fell into one of the five "otherwise provided" categories. He can not.

With respect to (1), as explained in Part II, a statement made after an ambiguous request for counsel is not excludable "by the Constitution." It is subject, at most, to any prophylactic rule that this Court might promulgate under *Miranda*. With respect to (2) and (3), as explained previously, neither Article 31 of the Code nor Rules 304 and 305 of the military rules authorizes exclusion. Concerning (4), there does not appear to be any other basis for exclusion in the manual. With regard to (5), Congress has expressly provided in Section 3501 that voluntary statements like

Davis's must be admitted. Thus, the rules governing courts-martial promulgated by Congress and the President as Commander-in-Chief require the admission of Davis's voluntary statements.

B. Congressionally-Adopted Rules Governing Courts-Martial Leave No Room for Prophylactic *Miranda* Requirements.

This Court may not promulgate a prophylactic rule of procedure contrary to the rules specified by Congress and the President for the conduct of courts-martial of uniformed members of the armed forces. As this Court has explained, "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress." *Burns v. Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion). Judicial deference is particularly important when the Court considers a challenge to the military justice system. *See Solorio v. United States*, 483 U.S. 435, 447-48 (1987) ("Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military."); *see also Chappell v. Wallace*, 462 U.S. 296, 300-01 (1983).

In several cases, the Court has refused to extend the full protection of the Bill of Rights to the military setting. In *Middendorf v. Henry*, 425 U.S. 25, 34 (1976), for example, the Court concluded that the Sixth Amendment's right to counsel did not apply to summary courts-martial. In *Parker v. Levy*, 417 U.S. 733, 758 (1974), the Court held that "[w]hile the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections." Thus, any suggestion that the protections of the Bill of Rights apply to the military jot-for-jot is inaccurate. *See Ex parte Quirin*, 317 U.S. 1, 39 (1942) (cases arising in the land or naval forces "are expressly excepted from the Fifth Amendment, and are deemed excepted by implication from the Sixth"); Brief for the

United States, *Weiss v. United States*, No. 92-1482 (1993) ("due process does not demand that the military justice system mirror the civilian system, or that every feature deemed essential in the civil system be found in the military justice system as well"). *See generally* Wiener, *Courts-Martial and the Bill of Rights: The Original Practice* (pts. 1 & 2), 72 HARV. L. REV. 1, 266 (1958) (original understanding of the Bill of Rights excluded members of the armed forces). *Cf.* Pet. Br. at 37 (recognizing "divergent application of constitutional rights" in the military).

Since the Court lacks the power to override an Act of Congress trimming the *Miranda* rules for federal prosecutions generally, *see* Part II.B, *supra*, the Court certainly may not announce different procedures for the conduct of courts-martial. Indeed, because the Court has concluded that application of even clearly-established Constitutional protections to military prosecutions is not automatic, extension of "prophylactic" rules must be even more questionable. Moreover, in Article 36 of the U.C.M.J., Congress specifically assigned the task of drafting court-martial procedures to the Commander-in-Chief—not the courts. In light of this background, it would be an extraordinary and inappropriate intrusion for the Court to promulgate a new prophylactic rule excluding from courts-martial incriminating statements made after ambiguous requests for counsel when Congress and the President have dictated otherwise.

For practical reasons as well, the Court should also be quite wary of adopting rules for courts-martial outside the *Military Rules of Evidence Manual*. If this Court accepts Davis's contention and creates a new prophylactic rule covering ambiguous requests for counsel, that rule will apply to all military courts-martial and create enormous implementation problems. As the drafters of the Military Rules of Evidence explained, the codification of the rules in the *Manual* is imperative "because of the large numbers of lay personnel who hold important roles within the military criminal legal system. Non-lawyer legal officers aboard ship, for example, do not have access to attorneys and law libraries." Mil. R. Evid., Section III, Drafters' Analysis. All of these reasons suggest that the Court should not extend a new prophylactic *Miranda* requirement requested by Davis

into the "vastly different," Pet. Br. at 37, world of the military.

IV. ANY EXPANSION OF *MIRANDA*'S PROPHYLACTIC RULES SHOULD BE UNDERTAKEN ONLY WITH GREAT CAUTION BECAUSE THE EXISTING RULES HAVE CAUSED GREAT HARM.

This Court has described *Miranda* as "a carefully crafted balance designed to fully protect *both* the defendant's and society's interests." *Moran v. Burbine*, 475 U.S. 412, 433 n.4 (1986). Yet any "balancing" of interests requires some attempt to measure the weights on the opposing sides of the scale. With respect to costs, it appears to be common ground that the *Miranda* litany will dissuade at least some suspects from giving important incriminating statements to law enforcement officers. *See, e.g., New York v. Quarles*, 467 U.S. 649, 657 (1984). To date, however, the Court's opinions have not contained any discussion attempting to quantify such costs. Instead, members of the Court have simply ventured the conclusion that the *Miranda* costs are, on balance, tolerable. *See, e.g., Rhode Island v. Innis*, 446 U.S. 291, 304 (1980) (Burger, C.J., concurring). Davis cites these statements in asserting that his proposed rule "is unlikely to have any appreciable costs for law enforcement." Pet. Br. at 30. Such sanguine assessments seem to assume that *Miranda* has not significantly harmed society's efforts to apprehend and convict criminals. The reasoning must be that, because the Court continues to see cases involving confessions, *Miranda* must not be causing any major adverse effects. The flaw in this argument is that it fails to consider "the loss of statements that are never obtained because of *Miranda*, voluntary statements that would help a trier of fact to determine the truth." J. GRANO, CONFESSIONS, TRUTH, AND THE LAW 202 (1993) (internal quotation omitted).

These costs of *Miranda* remain hidden to the judicial system because the courts can never hear an appeal from a crime victim concerning a crime that remained unsolved

because of the rigid, prophylactic *Miranda* requirements.[12] Because these victims of *Miranda* are "uncertain, unnamed and unrepresented," *Miranda*, 384 U.S. at 542 (White, J., dissenting), the Court appears to have continued to overlook them. Yet without some estimate of these costs from *Miranda*—specifically, the number of cases in which "a killer, a rapist or other criminal" has been returned "to the streets," *id.*—any cost-benefit calculation is without adequate foundation.

An analysis of the hidden costs of *Miranda* requires an assessment of two factors. First, one must determine the extent to which *Miranda* has reduced the confession rate, that is, an estimate of the number of lost confessions. Not every lost confession, however, is needed for a successful prosecution. The second factor one must consider, therefore, is the importance of confessions in obtaining convictions. The next subsections of this brief use the more than a quarter of a century of experience with *Miranda* to derive some tentative estimates of these factors. This quantification of the high costs of the existing *Miranda* rules surely counsels against Davis's proposed expansion of the rules.

A. The Available Empirical Research Supports the Conclusion that the *Miranda* Rules Have Substantially Reduced the Number of Confessions Given to the Police.

The change in the confession rate due to *Miranda* can be evaluated in two ways. One measure is the reduction that was found in "before and after" studies conducted around the time of the *Miranda* decision. The other

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[12] In an effort to prove that *Miranda* has had no deleterious effects, Davis notes that today more than 70% of military cases involve guilty pleas. Pet. Br. at 31 n.30. But cases involving crimes that remain unsolved because of *Miranda* would remain hidden under his figures, which are derived from dividing guilty pleas by cases in which the investigation has proceeded to a point where the evidence permits the filing of formal charges. Likewise, statistical studies of the number of suppression motions granted under *Miranda* miss the hidden unsolved cases.

measure is a comparison of the confession rate in this country under the *Miranda* rules with the higher rate in other comparable countries that use alternative approaches to custodial interrogation. Both of these gauges point to the same conclusion: *Miranda* has caused a significant drop in the confession rate.

1. *Assessments Taken Before and After* Miranda *Show a Substantial Drop in the Confession Rate.*

The before-and-after-*Miranda* studies show that the decision had "a major adverse effect on the willingness of suspects to respond to police questioning." OFFICE OF LEGAL POLICY, U.S. DEPARTMENT OF JUSTICE, REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRE-TRIAL INTERROGATION 62 (1986) (hereinafter cited as "OLP PRE-TRIAL INTERROGATION REPORT"). Perhaps the best study on the effect of *Miranda* on the confession rate is one Professors Seeburger and Wettick published concerning interrogations in serious crimes in Pittsburgh. They found that before *Miranda* Pittsburgh detectives obtained confessions in 54.4% of the cases (even though they gave some warnings to suspects); after *Miranda*, the rate was 37.5%, a 16.9% reduction. Seeburger & Wettick, Miranda *In Pittsburgh—A Statistical Study*, 29 U. PITT. L. REV. 1, 11 (table 1) (1967).

District Attorney Frank Hogan of New York County, New York collected statistics for presentations to the grand jury in his county. In the six months preceding *Miranda*, 49.0% of the felony defendants made incriminating statements. In the six months after *Miranda*, the number fell to 14.5%, a 34.5% decline. *See Controlling Crime Through More Effective Law Enforcement: Hearings Before the Subcomm. on Criminal Laws and Procedure of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 1120 (1967) (hereinafter cited as *Controlling Crime Hearings*).

In Philadelphia, then-District Attorney Arlen Specter reviewed the experience of the Philadelphia Police Department with *Miranda*. In October 1965, Philadelphia police began advising suspects of their right to counsel and 31.7% of individuals arrested refused to give statements. One year later, after the full *Miranda* warning-and-waiver regime took effect, 59.3% of individuals refused to give

statements, a 27.6% reduction in the willingness of suspects to provide statements. *See Controlling Crime Hearings*, *supra*, at 200-01.

District Attorney Aaron Koota of Kings County, New York, also testified before the Judiciary Committee. He reported that before *Miranda* for crimes such as homicide, robbery, rape, and felonious assault, approximately 10% of suspects refused to make statements. Following the decision, 41% refused to make statements, a 31% decline in willingness to speak to investigators. *See Controlling Crime Hearings*, *supra*, at 223.

James W. Witt surveyed the effect of *Miranda* on police in "Seaside City," a pseudonymous enclave in the Los Angeles area with a population of 83,000. He found a two percent decrease in the rate at which police obtained incriminating statements after *Miranda*, from 69% to 67%. Witt, *Non-Coercive Interrogation and the Administration of Criminal Justice*, J. Crim. L. & C. 320, 325 (1973). Other quantitative studies besides these five have been done, but all appear to have major flaws that render their data unreliable or unhelpful. *See generally* OLP Pre-Trial Interrogation Report, *supra*, at 63.[13]

2. *Confession Rates in this Country are Much Lower than in Countries That Have Not Imposed Rigid Right-to-Counsel and Waiver Rules for Custodial Interrogation.*

An examination of the experience in other countries can also be useful in assessing the effects of *Miranda*. *See New York v. Quarles*, 467 U.S. 649, 673 (1984) (O'Connor, J., concurring in part and dissenting in part) (footnote omitted). A review of data from other countries confirms the

[13] For example, the Project of the *Yale Law Journal* (cited in Pet. Br. at 31) found a ten to fifteen percent decline in the confession rate from 1960 to 1966 in New Haven. Project, *Interrogations in New Haven: The Impact of* Miranda, 76 Yale L.J. 1519, 1573 (1967). However the editors were suspicious of their pre-*Miranda* data for various reasons, *id.* at 1573, and their post-*Miranda* data is of limited value because the New Haven police in the time period surveyed (the summer of 1966) did not comply with *Miranda*, *see id.* at 1550.

conclusion that *Miranda* has adversely affected the ability of police officers to obtain incriminating information.

A good country for comparison is England. The historically-prevailing English approach gave suspects the equivalent of the first two *Miranda* warnings, but did not employ the other features of the *Miranda* system—right to counsel, waiver requirements, etc. *See* OLP Pre-Trial Interrogation Report, *supra*, at 84-86.[14] The available studies report very high confession rates in various English jurisdictions. For example, a study of Worcester found that suspects gave full confessions or made other incriminating statements in 86% of all cases. *See* Mitchell, *Confessions and Police Interrogation of Suspects*, 1983 Crim. L. Rev. 596, 598. A study of cases at the Old Bailey found an incriminating statement rate of 76%. *See* Zander, *The Investigation of Crime: A Study of Cases Tried at the Old Bailey*, 1979 Crim. L. Rev. 203, 213 (table 4). Other studies likewise report high rates of confessions and few suspects who remain silent. *See* Lidstone, *Investigative Powers and the Rights of the Citizen*, 1981 Crim. L. Rev. 454, 464-65 (collecting studies). These reported rates are substantially higher than the post-*Miranda* confession rate in the United States, where police obtain incriminating statements in at most 40 to 50 percent of all cases. *See* Part IV.A.1, *supra*; Comment, *Corroborating Confessions: An Empirical Analysis of Legal Safeguards Against False Confessions*, 1984 Wisc. L. Rev. 1121, 1195 & n.367 (collecting studies).

Another good country for comparison is our neighbor, Canada. The historically-prevailing approach of the Canadian police was to give *Miranda*-style warnings concerning the right to remain silent, but not to follow the rigid *Miranda* waiver requirements and questioning cut-off rules. *See generally* Caswell, *The Law Reform Commission of Canada, the Proposed Canada Evidence Act and Statements by an Accused*, 63 Can. B. Rev. 322 (1985); Pye, *The Rights of Persons Accused of Crime Under the Canadian Constitution: A Comparative Perspective*, 45 L. &

[14] Recent modifications of the English approach to custodial interrogation are discussed in Part V, *infra*.

CONT. PROB. 221 (1982).[15] The Canadian approach appears to produce confession rates substantially higher than the rates in this country. For example, in July 1985 the Halton Regional Police Force in Ontario, Canada undertook a two-year pilot project in one of their districts involving the videotaping of all interviews at the police station for crimes more serious than traffic and drunk driving offenses. *See* LAW REFORM COMMISSION OF CANADA, THE AUDIO-VISUAL TAPING OF POLICE INTERVIEWS WITH SUSPECTS AND ACCUSED PERSONS BY HALTON REGIONAL POLICE FORCE, ONTARIO, CANADA, AN EVALUATION (3rd Interim Report 1987). Despite the presence of videocameras to prevent police misconduct, the officers obtained very high confession rates of 70% or more and a refusal-to-talk rate of only 4%. *Id.* at 4.

B. Confessions Are Needed to Solve a Significant Proportion of Criminal Cases.

It has long been recognized that "[q]uestioning suspects is indispensable in law enforcement." *Columbe v. Connecticut*, 367 U.S. 568, 578 (1961) (Frankfurter, J.) (internal quotation omitted). Some quantification of the importance of confessions to successful prosecution is available. The Pittsburgh study found that, of total cases, a confession was needed to convict in 20.2% of all cases. Seeburger & Wettick, Miranda *in Pittsburgh—A Statistical Study*, 29 U. PITT. L. REV. 1, 15 (1967) (table 4). The New Haven Project estimated that in the cases they observed interrogation was "essential" in 3.3% and "important" in 10.0%, for a combined "interrogation necessary" category of 13.3%. *See* Project, *Interrogations in New Haven: The Impact of* Miranda, 76 YALE L.J. 1519, 1585 (1967) (table 20). The "Seaside City" study used the *Yale Law Journal* methodology and concluded that interrogation was "necessary" in 23.6% of all cases. Witt, *Non-Coercive Interrogation and the Administration of Criminal Justice: The Impact of* Miranda *on Police Effectuality*, 64 J. CRIM. L. &

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[15] Recently Canadian law on interrogation has become somewhat uncertain because of the passage of section 10(b) of the Canadian Charter of Rights and Freedoms. *See* Michalyshyn, *The Charter Right to Counsel: Beyond* Miranda, 25 ALBERTA L. REV. 190 (1987).

CRIMINOLOGY 320, 324 (1973) (table 2). Thus, without confessions, a significant percentage of cases cannot be successfully prosecuted.

C. Reasonable Estimates Suggest that *Miranda* Results in the Loss of Tens of Thousands of Prosecutable Criminal Cases Each Year.

This Court has not attempted to quantify the number of criminal cases that are lost each year because of the *Miranda* decision. Yet it is possible to tentatively calculate such a cost using the available reliable studies. The hidden cost of *Miranda* in terms of the percent of lost convictions per year can be determined by multiplying (1) the reduction in confession rate because of *Miranda* (in percentage terms) by (2) the number of cases in which confessions are needed to convict (in percentage terms). Even defenders of *Miranda* recognize that this is the proper methodology. *See, e.g.*, C. WHITEBREAD & C. SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 382 (3rd ed. 1993).[16] The absolute number of cases that are lost because of *Miranda* can be estimated by multiplying that percentage figure by the number of criminal suspects who are interrogated.

The available data allows a provisional completion of the equation. First, as recounted in Part IV.A.1, *supra*, the "reliable" before-and-after-*Miranda* studies—from Pittsburgh, New York County, Philadelphia, Kings County, and Seaside City—show confession rate[17] declines of 16.9%, 34.5%, 27.6%, 31.0%, and 2.0%, for an average reported decline

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[16] Recognizing that law enforcement officers do not interrogate every suspect would not significantly change the figures reported in this brief, since it appears to be standard practice to interrogate suspects in a very high percentage of cases. *See, e.g.*, U.S. DEPT. OF JUSTICE, NATIONAL INST. OF JUSTICE, ARRESTS WITHOUT CONVICTION: HOW OFTEN THEY OCCUR AND WHY 143 (1983); Seeburger & Wettick, *supra*, at 7.

[17] The studies from Philadelphia and Kings County measured changes in the refusal-to-talk rate rather than the confession rate. However, this change appears to be a reasonable surrogate for the reciprocally-related change in the confession rate.

of 22.4%.[18] The average also corresponds roughly to the difference between the post-*Miranda* confession rate in this country and the confession rate in England and Canada, based on the figures reported in Part IV.A.2, *supra*. Second, as recounted in Part IV.B, *supra*, an estimate of the importance of confessions can be derived from the average of the reliable studies on the subject—from Pittsburgh, New Haven, and Seaside City—which report confessions are necessary in an average of 19.0% of all cases.

Combining these figures produces the following result:

22.4% x 19.0% = 4.3%.

In other words, the existing empirical evidence supports the tentative estimate that *Miranda* has led to lost cases (that is, the loss of evidence necessary to convict a suspect[19]) against more than four percent of all interrogated criminal suspects in this country. One definitional point should be emphasized. This estimate of lost cases does not include cases in which police obtained a voluntary confession in violation of the *Miranda* rules that will therefore be suppressed at later stages of the criminal justice process. Instead, this estimate measures only the "hidden cases,"

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[18] These changes are not attributable to any disappearance of third-degree tactics. First, such methods were almost "nonexistent" by the time of the *Miranda* decision. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 93 (Feb. 1967). *See* F. GRAHAM, THE SELF-INFLICTED WOUND 22 (1969); W. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 386 (1965). Second, the *Miranda* rules were poorly suited to stop malevolent police officers bent on extracting truly involuntary confessions. *See Miranda*, 384 U.S. at 505 (Harlan, J., dissenting) ("Those who use third-degree tactics and deny them in court are equally able and destined to lie as skillfully about warnings and waivers.").

[19] These "lost cases" are not necessarily the same as lost convictions, but rather the cases in which, due to *Miranda*, prosecutors did not receive a confession and that confession was necessary to convict. It may be that some viable criminal cases that are presented to prosecutors will be dismissed or pled down for reasons that have nothing to do with the *Miranda* decision.

cases in which police never obtained confessions because of the *Miranda* rules.

Obviously this estimate is tentative. It involves averaging the available reliable studies and extrapolating across all offenses across the country. It also involves assuming that there have been no significant changes since the late 1960s in either the ability of law enforcement to obtain confessions or the importance of confessions to successful prosecution. But until further research on such questions is undertaken, a cost of approximately 4.3% of all serious cases would seem to be the best available estimate.

To reach an "absolute" number of criminals involved in these cases, it is necessary to multiply the percentage figure previously reported by the number of suspects interrogated. No national statistics are available on the number of suspects interrogated. A surrogate number is the number of suspects arrested for serious crimes, which is readily available in the Federal Bureau of Investigation's annual *Uniform Crime Reports* ("UCR"). Although "arrest" can be defined differently by various police agencies, the operational definitions for reporting purposes seem to coalesce around events such as "brought to the station" or "booking." *See* NATIONAL INST. OF JUSTICE, ARRESTS WITHOUT CONVICTION: HOW OFTEN THEY OCCUR AND WHY 40-41 (1983). These appear to be definitions that would correspond roughly with police opportunities for custodial interrogation.

Multiplying the *Miranda* cost figure of 4.3% by the latest UCR arrest figures for serious index crimes, U.S. DEPT. OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 1992 at 217 (1993) (table 29), suggests the tentative estimate that in 1992 alone *Miranda* produced more than 30,000 lost cases against criminals who committed violent crimes and 90,000 lost cases against criminals who committed serious property crimes. These are significant numbers and certainly suggest caution before expanding the prophylactic requirements of *Miranda*. Indeed, the Court has relied on smaller figures in creating a good faith exception to the Fourth Amendment exclusionary rule. *See United States v. Leon*, 468 U.S. 897, 907-08 & n.6 (1984). It should be noted that, unlike the costs of the exclusionary rule (which are concentrated in

narcotics and other contraband offenses), the costs of the *Miranda* rules fall across the full spectrum of criminal offenses, including such crimes of violence as murder, rape, robbery and aggravated assault.

V. TREATING THE *MIRANDA* RULES AS SUBJECT TO CONGRESSIONAL MODIFICATION WILL SPUR THE SEARCH FOR SUPERIOR ALTERNATIVES.

Beyond the release of dangerous criminals, perhaps the greatest tragedy of the *Miranda* decision is that it has blocked the search for superior approaches to custodial interrogation, alternatives that might better protect not only society's interest in apprehending criminals but also criminal suspects' interests in preventing coercive questioning. *Miranda* itself seemed to invite exploration of alternatives. 384 U.S. at 467 ("Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform"). In the quarter of a century since *Miranda*, however, reform efforts have been virtually nonexistent. As the Office of Legal Policy concluded:

> The *Miranda* decision has petrified the law of pre-trial interrogation for the past twenty years, foreclosing the possibility of developing and implementing alternatives that would be of greater effectiveness both in protecting the public from crime and in ensuring fair treatment of persons suspected of crime. Nothing is likely to change in the future as long as *Miranda* remains in effect and perpetuates a perceived risk of invalidation for any alternative system that departs from it.

OLP PRE-TRIAL INTERROGATION REPORT, *supra*, at 99.

This period of stagnation in the United States should be contrasted with reform efforts in other countries. England provides perhaps the best example. In 1984, Parliament passed the Police and Criminal Evidence Act (PACE), 1984, ch. 60. The Home Office followed up with the Code of Practice for the Detention, Treatment and Questioning of

Persons by Police Officers (1985) and the Code of Practice on Tape Recording (1988). These enactments provide a series of protections for suspects, including recording of interrogations, while attempting to provide police officers with a reasonable opportunity for questioning. It seems difficult to quarrel with the assessment that "[t]he results of the British experience thus far further demonstrate that the police interrogation process in the United States would benefit from a comparable effort." Berger, *Legislating Confession Law in Great Britain: A Statutory Approach to Police Interrogation*, 24 U. MICH. J. L. REF. 1, 64 (1990). Australia and Canada have also considered reforms. *See* LAW REFORM COMMISSION OF CANADA, REPORT 23: QUESTIONING SUSPECTS (1984) (proposing videotaping and other reforms); *McKinney v. The Queen*, 65 A.L.J.R. 241 (Austl. 1991) (endorsing fairness and recording requirements).

In this case, the Court has the opportunity to unfetter Congress and, perhaps, the state legislatures around the country. A ruling upholding Section 3501 or the provisions of the U.C.M.J. dealing with questioning—or at the very least an encouraging word about the constitutional viability of reform enactments—could be expected to set off exploration of other approaches to dealing with custodial interrogation.[20] As *Miranda* itself recognized, 384 U.S. at 467, there is no reason to believe that the Court can fashion rules regulating police questioning that are the best accommodation of the competing concerns. A ruling recognizing flexibility in this area would allow a "wide range of fundamental issues that have been foreclosed by *Miranda* [to] once again become open to study, debate, negotiation and resolution through the democratic process, restoring 'the initiative in criminal law reform to those forums where it truly belongs.'" OLP PRE-TRIAL INTERROGATION REPORT, *supra*, at 118-19, *quoting Miranda*, 384 U.S. at 524 (Harlan, J., dissenting).

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[20] For example, the investigative agency involved in this case (the Naval Investigative Service) already has in place disciplinary procedures for any agents who intentionally violate interrogation rules. *See* NAVAL INVESTIGATIVE SERVICE, MANUAL FOR ADMINISTRATION (NIS-1), chapt. 18, add. 1, p. 18-9 (Sept. 1990).

CONCLUSION

For the foregoing reasons, your *amici* respectfully request that the decision of the United States Court of Military Appeals refusing to suppress Davis's incriminating statements be upheld.

Respectfully submitted,

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